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PRINCIPLES OF CONTRACT

AT LAW AND IN EQUITY:

BEING A TREATISE ON
THE GENERAL PRINCIPLES CONCERNING THE
VALIDITY OF AGREEMENTS,
WITH A SPECIAL VIEW TO THE COMPARISON OF LAW AND EQUITY
AND WITH REFERENCES TO THE INDIAN CONTRACT ACT,
AND OCCASIONALLY TO
ROMAN, AMERICAN, AND CONTINENTAL LAW.

Second Edition.

BY
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OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW,
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TO

MY MASTER IN THE LAW

THE HON. SIR NATHANIEL LINDLEY, KNIGHT,

ONE OF HER MAJESTY'S JUSTICES OF THE

COURT OF COMMON PLEAS,

I DEDICATE

THE FIRST FRUITS OF HIS TEACHING.

PREFACE

TO THE FIRST EDITION.



The design of the present undertaking is to supplement rather than to compete with existing works. Notwithstanding all that has been written on the law of Contracts, there seems still, and indeed especially at the present time, to be room and occasion for a Treatise on the general principles which determine the validity and effect of contracts in their inception.

The development of these principles in English procedure has been in great measure a concurrent one in the courts of law and of equity, and at the same time has led to apparent conflicts on many points, and real conflicts on some points, between the two systems. The lamentable division of jurisdiction, as Lord Westbury called it, which has now come to an end, led unavoidably to a no less lamentable division of exposition in text-books. Writers on the law of Contract have confined themselves (save for very brief passing notices or allusions) to the common-law parts of the subject, leaving the rest to be sought in books on equity jurisprudence, where in the press of other matter there was no room for its adequate treatment, apart from the disadvantages of dealing with it chiefly or wholly with a view to equity procedure, whereby the more general and permanent elements and the broader principles of law on which the rules were in truth founded were in danger of falling out of sight.

Moreover there are really doubtful questions in the application of the leading principles of Contract, the discussion of which in a connected form has hitherto been almost if not altogether prevented by the foregoing and other reasons.

I have therefore attempted to give in this book, so far as possible, an equal and concurrent view of the doctrines of common law and of equity, and to fix the scope of my subject so that matters of doubt and difficulty might be considered with some fulness.

Among the topics to which this remark especially applies are the following: the power of married women to bind their separate estate by engagements in the nature of contract; the effect of the rules of partnership developed in courts of Equity in limiting the capacity of the governing bodies of companies to bind the corporation by their acts; the assignment of contracts, and covenants running with land; Mistake, and the rectification of instruments; the theory of Misrepresentation as distinct from actual Fraud; the equitable doctrine of Undue Influence; and to some extent the peculiar conditions attached to the remedy of Specific Performance.

I have avoided dwelling on anything practically unimportant or out of date, unless for special reasons, and have sought to be brief in the statement of clear and familiar law. And I have confined myself, where it seemed possible, to citing the latest and best authorities, so as to indicate the means for a complete search without multiplying merely illustrative references. At the same time I have endeavoured to show distinctly the authority which establishes each separate proposition, so that the reader may not have to look through many cases to find at last that few or none are relevant, but may be directed at once to the decisions material to the very point before him.

The work may be looked upon as being, in its general plan, an endeavour to answer the questions that arise upon the inception of a contract. Is there an agreement concluded in terms? (Ch. I.) Is it made between competent

parties? (Ch. II.) Does it satisfy the requirements of the law as to form (if any there be for the particular kind of contract) (Ch. III.) and consideration? (Ch. IV.) Who may now, or hereafter, sue or be sued upon it? (Ch. V.) So far as to what may be called the first elements. We have further to ask if there is nothing in the matter of the agreement to interfere with its validity: whether it be unlawful (Ch. VI.) or impossible (Ch. VII.) Again, the question may arise whether there is nothing to prevent the expressed consent of the parties from having its full effect. By reason of mistake (Ch. VIII.) the consent may be only apparent, or a true consent may be wrongly expressed; or by reason of misrepresentation (Ch. IX.), fraud (Ch. X.), coercion or undue influence (Ch. XI.), the consent of one of the parties may not be binding upon him. Finally there may be a question whether we have to deal with one of those curious and more or less anomalous cases where there is an agreement neither void nor voidable, for some purposes recognized and having legal consequences, yet not directly enforceable (Ch. XII.) Questions arising on the performance or discharge of contracts are not considered except incidentally.

Some digressions have been deliberately admitted, partly for reasons of practical convenience, partly on account of the subjects having a special interest on historical or other grounds. In one or two instances I have sacrificed scientific arrangement for the sake of keeping things in the place where I thought a reader would expect to find them: thus the rules as to the rescission of voidable contracts in Ch. X. should strictly have formed a separate chapter.*

The Indian Contract Act has been almost constantly kept in view. Most of the sections relevant to the topics here considered will be found cited in full either in the text or in the notes. Possibly this may be not without practical use to some of my readers: but apart from this, the Contract Act deserves, as it appears to me, more atten-

* I have ventured to act on this in the second edition. Ch. IX. now embraces both Misrepresentation and Fraud.

tion from English lawyers than to my knowledge it has yet received. It is a most instructive example of what can be done to consolidate and simplify English case-law, and shows better than any discussion can do what are the real advantages of codification, the real difficulties to be overcome, and the most likely means of overcoming them.

I have not attempted to collect American authorities: the ever growing bulk of English reports alone is already formidable enough to deal with. But some account has been given of a certain number of decisions of the Supreme Court, selected as being recent or otherwise of marked importance.

Considering the amount of coincidence (if not more than coincidence) between English and Roman law in the main principles of Contract, I have felt justified in making a pretty free use of the Roman law for purposes of illustration and analogy. I have also referred at times to modern Continental Codes, especially where it seemed that light might be thrown on a topic of special legislation, or of what is called "the policy of the law," by extending the range of observation. However no systematic comparison has been undertaken. On points of Roman law (and to a considerable extent, indeed, on the principles it has in common with our own), I have consulted and generally followed Savigny's great work.

My obligations to foregoing English writers are acknowledged to the best of my power in their proper places in the text. Here I must express my thanks to my friend Mr. W. R. Kennedy, of Lincoln's Inn, for valuable suggestions and contributions, especially on the subject of Ch. VII.; and in like manner to my friend Mr. G. H. Blakesley, of Lincoln's Inn, especially as to Ch. X.

F. P.

5, NEW SQUARE, LINCOLN'S INN,
December, 1875.

PREFACE

TO THE SECOND EDITION.

In this edition the Appendix on Agency has been transferred from Chapter VIII. to Chapter V. as a more appropriate place, and the division of Chapters IX. and X. is altered. I have also added a new Appendix to Chapter V., giving a fuller account of a series of cases in the Year Books which in the first edition were merely referred to. This piece of the mediæval history of English law will, I hope, be not without curiosity for some of my readers.

Otherwise the plan and order of the work are unchanged : but it has been revised throughout, and various completions and corrections have been made besides the additions required by new cases. As to these last there is always a temptation to evade the duty of considering their whole bearing on the points they deal with, working their effect into the text, and for this purpose recasting if necessary a sentence or even a paragraph. In fulfilling this duty there may be some trouble, and there is little or none in the facile course of evasion which consists in merely adding a new reference in a foot-note. I have striven to withstand the temptation, but I cannot be sure that I have always withstood it.

The Index has in pursuance of a friend's suggestion been made fuller than it was, and I trust that by means of this and other improvements in the present edition the book will be found more deserving of the favour which has already been shown to it by the profession.

I would add to what I have already said of the Indian Contract Act that an authorized English reprint of it would be of great use and convenience. At present copies cannot be procured in this country without much trouble and delay. It seems a strange thing that the legislation of France and Germany should be more accessible to English students than that of our own Empire.

F. P.

5, NEW SQUARE, LINCOLN'S INN,
April, 1878.

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NOTE OF SOME EDITIONS CITED, AND ABBREVIATIONS.

Benjamin on Sale. Second edition, 1873.

Dart's Vendors and Purchasers. (Dart, V. & P.) Fifth edition, 1876.

I. C. A. The Indian Contract Act is sometimes thus cited.

Law Journal. Always cited by the number of the vol. in the New Series.

Law Reports (1865—75). The Chancery Appeal and Equity cases are cited as "Ch." and "Eq." simply.

Lewin on Trusts. Sixth edition, 1875.

Lindley on the Law of Partnership. (Sometimes cited by the author's name alone.) Third edition, 1873.

Saunders' Reports, notes to by the late Serjeant Williams (Wms. Saund.) Ed. 1871. Cited by the paging of that edition, not the pages of Saunders.

Savigny, System des heutigen römischen Rechts (Savigny, or Sav. Syst.) Berlin, 1840—1849.

Savigny, Das Obligationenrecht (Sav. Obl.) Berlin, 1851—3.

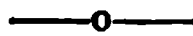
Smith's Leading Cases (Sm. L. C.) Seventh edition, 1876.

Vangerow, Lehrbuch der Pandekten (Vangerow, Pand.) Seventh edition, Marburg and Leipzig, 1863.

Pothier's and Story's works are cited by the consecutive sections.

Savigny and Vangerow are cited indifferently by volume and page, or by the consecutive sections, often by both.

ERRATA.



Page 96, note (a), for *Taylor v. Chichester & Co.*, read *Taylor v. Chichester & Midhurst Ry. Co.*

„ 126, line 11, for 603 read 600.

„ 288, „ 2 from foot, for *soes* read *soens*.

„ 409, „ 18, for *Hunter v. Humble* read *Humble v. Hunter*.

A D D E N D A.



Pages 24, 28. On the question when a contract is concluded, notwithstanding that the parties intend it to be put into a more exact shape, and on the subject of acceptance by conduct, see now *Brogden v. Metropolitan Ry. Co.*, 2 App. Ca. 636. The doctrine that a mere mental assent uncommunicated to the proposer is not an acceptance, on which doubt seems to have been thrown in the Court below, is also reaffirmed; see especially per Lord Blackburn, at pp. 691, 692. "When an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound:" p. 691.

In this case the conduct of the parties, who in fact dealt for some time on the terms of a draft agreement which had never been formally executed, was held, as being inexplicable on any other supposition, to show an actual though informal consent to a contract upon those terms: see Lord Cairns' opinion. See further, as to "the distinction between an agreement which is final in its terms and therefore binding, and an agreement which is dependent upon a stipulation for a formal contract," *Winn v. Bull*, 7 Ch. D. 29, where Jessel, M. R. decided that an agreement "subject to the preparation and approval of a formal contract" was not binding, and expressed an opinion that the authorities had gone too far in enforcing specific performance of agreements made out from informal documents.

Pages 37, 48. As to infants' contracts of service, add reference to *Leslie v. Fitzpatrick*, 3 Q. B. D. 229.

Pages 63, 72. In actions against a married woman in respect of her separate estate the husband must still be joined as a party in all cases except those in which the Married Women's Property Act, 1870, expressly provides that she may be sued alone: *Hancocks v. Lablache*, in C. P. D. Mar. 9, 1878.

Page 68, note (a). *Morrell v. Cowan* has been reversed in C. A. 7 Ch. D. 151, on the construction of the guaranty. The point for which the case is cited is not affected.

Page 146, note (c). Add reference to *Kronheim v. Johnson*, 7 Ch. D. 60.

Page 158. (As to adequacy of consideration not being material). "A. is possessed of Blackacre, to which B. has no manner of right, and A. desires B. to release him all his right to Blackacre, and promises him in considera-

tion thereof to pay him so much money ; surely this is a good consideration and a good promise ; for it puts B. to the trouble of making a release." Holt, C. J. 12 Mod. 459, cited in Viner's Abr. Plea and Pleadings, G., pl. 9.

Pages 188, 198, 233. It has been held in *Spiller v. Paris Skating Rink Co.* 7 Ch. D. 368, that a company can ratify a contract made by promoters before the company was in existence. *Sed qu.*

Page 224, note (a). Add reference to observations of James, L. J. in *German v. Chapman*, 7 Ch. D. at p. 279.

Page 258. *Sottomayor v. De Barros*, in C. A. is now reported, 3 P. D. 1. The precise point decided is that where two persons go through a ceremony of marriage in England, being under no disability to marry one another by English law, but being at the time of the ceremony both domiciled in a country the laws of which prohibit their marriage, such marriage is null and void.

Page 327, note (b). Add reference to *Allkins v. Jupe*, 2 C. P. D. 275.

Page 345. As to the Truck Act add reference to *Smith v. Walton*, 3 C. P. D. 109.

Page 409, note (d). *Lindsay v. Cundy*, 2 Q. B. D. 96, has been affirmed in the House of Lords, *nom. Cundy v. Lindsay*, Mar. 4, 1878.

Pages 416, 420. As to performance of the contract with compensation in a case of error in quantity, add reference to *McKenzie v. Hesketh*, 7 Ch. D. 675.

Pages 464, 482. On the question how far conduct without any statement in words may amount to a representation, for the purposes of an action of deceit, see *Ward v. Hobbs* (C. A.) 3 Q. B. D. 150.

Page 531. As to transactions between solicitor and client, add reference to *McPherson v. Watt*, 3 App. Ca. 254 ; as to re-opening accounts between them, *Watson v. Rodwell*, 7 Ch. D. 625.

PRINCIPLES OF CONTRACT

AT LAW AND IN EQUITY.

CHAPTER I.

AGREEMENT, PROPOSAL, AND ACCEPTANCE.

It is somewhat curious that no such thing as a satisfactory definition of Contract is to be found in any of our books. The truth is that not one definition but a series of definitions is required, and this want is supplied by the interpretation clause of the Indian Contract Act (to be presently quoted) with a completeness and accuracy which in the present writer's judgment are not likely to be much improved upon for any practical purpose. Before we come to this, however, it is worth while to show, by approaching the conception of Contract from a more general point of view, of how special and complex a nature the conception really is.

Contract a special and complex conception.

One always thinks of the consent of the parties as the main thing that goes to make a contract, as beyond question it is. A contract is before all things a transaction in which two or more persons consent. But this is a generic, not a specific description. Every contract involves consent, but many legal transactions involve consent without being contracts. For a generic name of all legal transactions in which consent is necessary we may provisionally, for want of any better word, use the term Agreement in the widest possible sense (a). Let us now see how many things are included in the consent that makes a legal

A branch of Agreement in wider sense—Savigny's analysis.

(a) *Vertrag* as used by Savigny, p. 307) we follow almost literally in whose analysis (Syst. § 140, vol. 3., this paragraph.

agreement. Consider a familiar and unquestionable instance, the contract of sale. The first thing we observe is that it takes not less than two persons to make it. In this and in most cases there are in fact not more ; but others readily occur, such as partnership, where the number is not limited. The next thing is that these persons have a distinct intention, and the intention of both or all of them is the same. Without this one obviously cannot say there is an agreement. Next, they must be aware that their intentions agree : in other words, they must communicate them to one another, for it is again obvious that uncommunicated intentions, however exactly they correspond, do not make an agreement. Moreover the scope of the intention is material. If people make arrangements to go out for a walk or to read a book together, that is no agreement in a legal sense. Why not ? Because their intention is not directed to legal consequences, but merely to extra-legal ones ; no rights or duties are to be created. In the case of the sale the buyer and the seller intend to acquire new rights and undertake new duties. The buyer means to become the owner of the goods, and the seller to become his creditor for the price, and this is what gives the agreement its legal character (*a*). The intention of the parties must therefore be an intention directed to legal consequences ; and, finally, those consequences must be such as to confer rights or impose duties on the parties themselves. The judgment of a full Court, or the verdict of a jury, for example, expresses a common intention of several persons which has legal consequences for its immediate object, and yet it is not an agreement. Nobody would think of calling it so. Why not ? Because the rights and duties determined by the judgment or verdict are not those of the judges or jurors. The result, then, comes out in this way :

Definition
of agree-
ment : co-
vers much
more than
contract.

When two or more persons concur in expressing a common intention so that rights or duties of those persons are thereby determined, this is an agreement (*b*).

(*a*) The difference is "dass in diesem der Wille auf ein Rechtsverhältniss als Zweck gerichtet ist, in jenen Fällen auf andere Zwecke" : the want of an English equivalent for *Rechtsverhältniss* has made some

circumlocution unavoidable in the text.

(*b*) The original words are subjoined, as a perfectly literal translation is not practicable: Vertrag ist die Vereinigung Mehrerer zu einer

The first point that strikes us in this definition is its extreme comprehensiveness. It includes every kind of transaction which affects the rights of the parties and to which the consent of more than one of them is necessary. Not only contract, but every sort of conveyance is covered by it; even a conveyance by way of absolute and immediate gift (*a*). The last item is at first sight startling, especially as there are certain ways of making a gift (otherwise than by a transfer of property) in which the assent or knowledge of the donee is immaterial (*b*). But to say that a conveyance by way of gift imports an agreement is only to say that ownership cannot be thrust on a man against his will, and in this form there is nothing strange in the proposition. And in fact there is express authority in our law to show that "it requires the assent of both minds to make a gift, as it does to make a contract" (*i.e.*, when the gift is to take effect by way of a transfer of property to the donee), although the donee's assent is readily presumed, and therefore if money is offered as a gift but not accepted as such, the subsequent agreement of the parties may make it a good loan (*c*). In like manner the definition now before us includes, of course, gratuitous obligations as well as those made upon valuable consideration. So much as to its general contents. It will now sufficiently appear that its proper place, in this highly general form, is in a work reviewing the whole field of legal conceptions in the most general manner possible (which Savigny's in fact does) (*d*); and further analysis is required before we can arrive at anything applicable to the special treatment of contract.

übereinstimmenden Willenserklärung, wodurch ihre Rechtsverhältnisse bestimmt werden. Savigny, Syst. § 140 (3, 309). This is one of the things which look very obvious when they are once stated, and the reader may be tempted to think it too obvious to be worth making so much of. But it is just these obvious things which remain hidden or unfruitful till a man of true scientific genius like Savigny sees the importance of bringing them distinctly into the light.

(*a*) Conveyance, of course, contains something beyond agreement, namely, the transfer of property.

All that is meant is that every conveyance includes an agreement.

(*b*) Savigny, Syst. § 160 (4, 145-50). The most striking case, however,—the payment of another man's debt—is at least doubtful in English law.

(*c*) *Hill v. Wilson*, 8 Ch. 888, 806. Cp. D. 89, 5. de don. 10; D. 44, 7 de obl. et act. 55.

(*d*) Nothing would be easier than to produce any amount of mistaken criticism on this and other parts of Savigny's work by not attending to its true object and character, which are fully explained by himself in the preface to vol. 1.

Further
analysis :
How is the
intention
expressed ?

The central part of this group of ideas is that the parties *concur in expressing a common intention*. Let us see how this is brought about. They must be assured by mutual communication that a common intention exists, that they mean the same thing in the same sense. But must they then proceed to a further act of expressing this intention? No, there is no need for anything more, unless indeed it is understood between the parties, as in particular cases it may be, that only a subsequent formal expression is to bind them, or unless something more is specially prescribed by law. When the communication is complete, the expression is complete; the expression of the common intention is the sum of the complete communication and nothing else. How then is the communication completed? We only have to look at the way in which bargains are struck or go off in all men's experience. The communications begin with a proposal of certain terms from one party. The other either accepts them, when there is an end of it, or he does not, when again there is an end of it for the time being and so far as that particular proposal is concerned. But it often happens that one or other of the parties, unwilling merely to break off, thereupon suggests something rather different; and thus they may go on trying counter-proposals indefinitely till they either give it up, or one of them makes a proposal which the other can accept as it stands. Thus the conduct of every bargain which is struck is ultimately reducible to the form: Will you do so and so on such and such terms?—I will: and the conduct of every attempted bargain which goes off is ultimately reducible to the form: Will you do so and so on such and such terms?—I will not. We can put all this together into a statement of the following kind:

Mutual
communi-
cation by
proposal
and ac-
ceptance.

The mutual communication which makes up an expression of common intention for the purposes of legal agreement consists of proposal and acceptance.

As a matter of historical fact, this comes out in the most striking and definite form that can be in the formal question (proposal) and answer (acceptance) of the Roman Stipulation. Yet this particular analysis of the elements of contract is as a rule comparatively neglected by writers on the civil law, while

its importance as a distinct part of the legal theory is fully brought out in our own books. However, German jurisprudence has apt technical words for dealing with the subject, and in some modern books a good deal of attention is paid to it (a).

Thus far, however, we are still on general ground. We have not yet got any specific mark of contract, as distinguished from agreement (= *Vertrag*) in the wide sense. What distinguishes the agreement in a contract from the agreement in any other of the transactions falling within the more general conception, such as for example a perfect conveyance? The distinction is this: in the case of a contract something remains to be done by one or by each of the parties, which the other has or will have a right to call upon him to do. Now, in the language of Roman law (which is often adopted by our own, but perhaps cannot strictly be called part of it), there is a technical and appropriate name for this state of things. When one man has a peculiar right (i.e., not a merely public right, or a right incident to ownership or a permanent family relation) to control another man's actions by calling upon him to do or forbear some particular thing, there is said to be an obligation between them (b). The person whose action is thus controlled is said to be obliged or bound. A contract accordingly is an agreement which produces an obligation (c). In this case, therefore, the common intention expressed by the parties has this peculiar character, that it contemplates a future performance or performances to which one or each of them is to be bound. On the side of the party so bound, the expression of this intention is accordingly nothing else than an undertaking to perform the thing he is bound to—in other words, a promise. This is the specific mark of Contract which we sought. That which distinguishes it from the genus Agreement is that the expression of intention is not only constituted by proposal and acceptance, but includes the particular kind of expression which is called a promise. We have as the proper groundwork of contract a promise determined by the acceptance of a proposal.

Specific mark of contract : The agreement is such as to give rise to an obligation.

And is expressed by a promise.

(a) See Vangerow, Pand. § 603 (3, 248, &c., 7th ed.). The terms are *Antrag* = Proposal; *Annahme* = Acceptance.

(b) Sav. Syst. 1. 338-9; *id.* Obl. 1. 4, seq.

(c) *Obligatorischer Vertrag*, or

(expanding *Vertrag* according to its previous definition) thus: *Vereinigung Mehrerer zu einer übereinstimmenden Willenserklärung, wodurch unter ihnen eine Obligation entstehen soll.* Sav. Obl. 2, 7, 8.

The notion of Agreement in its largest sense, from which we set out to this end, has now served our purpose, and we have no more to do with it. The reason for saying this expressly is that we shall henceforth find it convenient, and indeed necessary, to use the word with a more limited meaning.

Definition
of Indian
Contract
Act.

The leading ideas being thus worked out, the next thing would be to embody them in definitions. This part of the work, however, is fortunately done to our hand by the Indian Contract Act 1872, and we are now in a position to appreciate the value of it. The second section of the Act runs thus :—

“In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal :

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise :

(c) The person making the proposal is called the “promisor,” the person accepting the proposal is called the “promisee” :

(d) When, at the desire of the promisor, the promisee, or any other person, has done or abstained from doing, or does, or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise :

(e) Every promise, and every set of promises forming the consideration for each other, is an agreement :

(f) Promises which form the consideration, or part of the consideration for each other, are called reciprocal promises :

(g) An agreement not enforceable by law is said to be void :

(h) An agreement enforceable by law is a contract :

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract :

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.”

Remarks
on terms :
“agree-
ment”
and “con-
tract.”

The language here used is mostly familiar to English law, so that only one or two points call for any remark. In English books “offer” is constantly used as a synonym for “proposal,” and perhaps rather the more often of the two. The use of the one or the other word seems a pure matter of taste. For a legislative

definition, of course, it was convenient to keep only one. The distinction between "agreement" and "contract," by which "contract" means only a valid and enforceable agreement, answers to the classical difference in Latin between *contractus* and *pactum*, which perhaps suggested it, but is new in our language. The phrase "a void contract," which often occurs in English books, is according to this definition a contradiction in terms. The innovation seems to us a clear improvement, for it makes the legal meaning of the words more precise and convenient, without doing any violence to former, or even to popular usage, and as a rule we shall adopt it (a).

The subject of Consideration is reserved for a separate chapter.

The distinction between *void* and *voidable* transactions, here expressed in the form of a definition, is one of the most fundamental and important in the law, though a great deal of laxity is to be found even in modern books in the use of the two words.

An agreement or other act which is *void* has from the beginning no legal effect at all, save in so far as it may subject the parties to penal consequences in any case where it is made void by some special prohibitive law which also imposes a penalty. No person's rights can be affected by it, whether he be a party or a stranger.

A *voidable* act, on the contrary, will have all its proper legal effects unless and until it is disputed and pronounced invalid. And it can be disputed only by certain persons and under certain conditions.

It is needless to say more in general terms of this distinction, which we shall find amply illustrated in almost every branch of the subject. We must note, however, that the language of subsections (g) and (j) is not exactly applicable to English law (b). For in the chapter on Agreements of Imperfect Obligation we shall see that there are many agreements which, although they cannot be enforced, yet are by no means to be spoken of as void, inasmuch as they are otherwise recognized by law, and have distinct legal consequences.

(a) The distinction might be exhibited thus in Savigny's terminology: Agreement = Vertrag, wodurch eine Obligation entstehen soll. Contract = Vertrag, wodurch eine klagbare Obligation entsteht.

(b) This applies in some cases to sub-a. (i) also. When a memoran-

dum of an agreement required by the Statute of Frauds to be in writing has been signed by one party but not by the other, the agreement is enforceable at the option of him who has not signed, but not at the option of the other: but we can hardly call this a voidable contract.

The main principle being fixed that a contract is constituted by the acceptance of a proposal, it remains to note the applications of it in detail, which for the most part are obvious corollaries, though considerable difficulties arise in some particular instances.

Applications ;
Revoca-
tion of
proposal.

1. A proposal may be revoked at any time before acceptance, but not afterwards.

For before acceptance there is no agreement, and therefore the proposer cannot be bound to anything (a). So that even if he purports to give a definite time for acceptance, he is free to withdraw his proposal before that time has elapsed. He is not bound to keep it open unless there is a distinct collateral contract to that effect, founded on a distinct consideration. If in the morning A. offers goods to B. for sale at a certain price, and gives B. till four o'clock in the afternoon to make up his mind, yet A. may sell the goods to C. at any time before four o'clock, so long as B. has not accepted his offer. But if B. were to say to A.: "At present I do not know, but the refusal of your offer for a definite time is worth something to me; I will give you so much to keep it open till four o'clock" (or even, it may be, "If you will keep it open till four o'clock, then, in the event of my taking the goods, I will add so much to the price") (b), and A. were to agree to this, then A. would be bound to keep his offer open, not by the offer itself, but by the subsequent independent contract. This doctrine was established by *Cooke v. Oxley* (c), and followed in *Routledge v. Grant* (d) and other cases, and has lately been confirmed by the Court of Appeal (e). It is different in the modern civil law. There a promise to keep a proposal open for a definite time is treated as binding, as indeed there appears no reason why it should not be in a system to which the doctrine of consideration is foreign: nay, there is held in effect to be in every proposal an implied

Cooke v.
Oxley.

(a) The same rule applies to a proposal to vary an existing agreement; *Gilkes v. Leonino*, 4 C. B. N. S. 485.

(b) See *G. N. Ry. Co. v. Witham*, L. R. 9 C. P. 16: combining this with the principle of *Hochster v. De la Tour*, 2 E. & B. 678, 22 L. J. Q. B. 455, and *Frost v. Knight*, L. R. 7 Ex. 111, one may get the result in

the text.

(c) 3 T. R. 653; affd. in Ex. Ch., see note.

(d) 4 Bing. 653.

(e) *Dickinson v. Dodds*, 2 Ch. D. 463. For a conclusive answer to criticisms which have been made upon *Cooke v. Oxley* see Benjamin on Sale, 51-55.

promise to keep it open for a reasonable time (*a*). In our own law the effect of naming a definite time in the proposal is simply negative and for the proposer's benefit: that is, it operates as a warning that an acceptance will not be received after the lapse of the time named. In fact the proposal so limited comes to an end of itself at the end of that time, and there is nothing for the other party to accept. This leads us to the next rule, namely:—

2. The proposer may prescribe a certain time within which the proposal is to be accepted, and the manner and form in which it is to be accepted. If no time is prescribed, the acceptance must be communicated to him within a reasonable time. In neither case is the acceptor answerable for any delay which is the consequence of the proposer's own default. If no manner or form is prescribed, the acceptance may be communicated in any reasonable or usual manner or form.

Determin-
ation of
proposal
by lapse of
prescribed
or reason-
able time.

This is almost self-evident, standing alone; we shall see the importance of not losing sight of it in dealing with certain difficulties to be presently considered. Note, however, that though the proposer may prescribe a form or time of *acceptance*, he cannot prescribe a form or time of *refusal*, so as to fix a contract on the other party if he does not refuse in some particular way or within some particular time (*b*).

Among other conditions, the proposal may prescribe a particular *place* for acceptance, and if it does so, an acceptance elsewhere will not do (*c*). The real question in cases of this kind is whether the condition as to time, place, or manner of acceptance was in fact part of the terms of the proposal.

There is direct authority for the statement that the proposal must at all events be taken as limited to a reasonable time (*d*); nor has it ever been openly disputed. The rule is obviously required by convenience and justice. It may be that the proposer has no means of making a revocation known (*e.g.*, if the other party changes his address without notice to him, or goes on a long journey), and he cannot be expected to wait for an unlimited

(*a*) Vangerow, Pand. § 603 (3, 253); see L. R. 5 Ex. 337, *n*.

(*b*) *Felthouse v. Bindley*, 11 C. B. N. S. 869, 875, 31 L. J. C. P. 204.

(*c*) *Eliaon v. Henshaw* (Sup. Ct. U. S.), 4 Wheat. 225, Langdell, Sel.

Ca. on Cont. 48.

(*d*) *Baily's ca.*, 5 Eq. 428, 3 Ch. 529; *Ramsgate Hotel Co. v. Montefiore, same Co. v. Goldsmid*, L. R. 1 Ex. 109.

time. There is also direct authority to show that an acceptance not communicated to the proposer or his agent does not make a contract (a).

Revoca-
tion of
proposal
must be
communi-
cated
before ac-
ceptance.

3. A proposal is revoked only when the intention to revoke it is communicated to the other party. Therefore a revocation communicated after acceptance, though determined upon before the acceptance, is too late.

Civilians
differ :
contra
Pothier,
sic Vange-
row.

Putting out of the question for the present any difficulties that may arise as to what is in point of law the true date of the acceptance, it is clear from the cases presently to be mentioned that this is the rule of the common law. The civilians differ on the point. Pothier lays down a directly contrary rule in a well-known passage (*Contr. de Vente*, § 32) which we need not repeat, as it is given with slight abridgment by Mr. Benjamin (*On Sale*, 57-8.) He does not fail to see the manifestly unjust consequences of letting a revocation take effect, though the other party has received, accepted, and acted upon the proposal without knowing anything of the proposer's intention to revoke it ; but he escapes them by imposing an obligation on the proposer, upon grounds of natural equity independent of contract, to indemnify the party so accepting against any damage resulting to him from the transaction. This treatment of the subject wholly overlooks the consideration that not intention in the abstract, but communicated intention, is what we have to look to in all questions of the formation of contracts (b). And the obligation to indemnify (which must be classed as *quasi ex delicto* if anything) is not only a cumbrous and inelegant device, but as Mr. Benjamin points out, overshoots its mark by being in turn unfair to the proposer. Far more satisfactory is Vangerow (*Pand.* § 603), whose opinion is to this effect. The declaration of an *animus contrahendi* (whether by way of proposal or of acceptance) when once made, must be regarded as continuing so long as no revocation of it communicated to the other party. A revocation not communicated is in point of law no revocation at all. In this respect the revocation of a proposal or acceptance must be governed by the

(a) *M' Iver v. Richardson*, 1 M. & S. 557; *Mozley v. Tinkler*, 1 C. M. & R. 692; *Russell v. Thornton*, 4 H. & N. 788, 798, 804; *Hebb's ca.*, 4

Eq. 9, and see p. 15 *infra*.

(b) So Mr. Leake justly remarks (*On Contracts*, 20, n.).

same rules as the proposal or acceptance itself. These principles, it seems to us, are entirely right if tested by common sense and convenience, and are in accordance with the authorities of the common law when rightly understood.

4. The communication of an acceptance or of its revocation is subject to the same rules as the communication of a proposal or of its revocation.

Accept-
ance or
revocation
thereof
follows
same rules
as pro-
posal.
Difficulties
as to con-
tracts by
corre-
spondence.

This seems obvious enough, yet it is very possible to overlook it, and more distinct attention to it might perhaps have saved the law from some of the complication and difficulty which at present attend a particular class of cases. This class is one of great and increasing importance—namely, where a contract is entered into by correspondence between persons at a distance. The proposer is bound, of course, from the date of acceptance. The great question is, what is for this purpose the date of acceptance? And it has been assumed, without any real necessity, that some one moment must be fixed at which the contract is made absolute for *all purposes*: hence the difficulties that have been found in stating a satisfactory rule. As far as proposition 3 is concerned it is plainly just and expedient that the acceptance should date from the time when the party has done all he can to accept, by putting his affirmative answer in a determinate course of transmission to the proposer. From that time he must be free to act on the contract as valid, and disregard any revocation that reaches him afterwards. And it is very natural, and in fact there is a strong tendency in the English authorities, to conclude that at this point the contract is wholly irrevocable and absolute; so that on the one hand the acceptor remains bound, though he should afterwards despatch a revocation which arrives with or even before the acceptance; and on the other hand the proposer is bound, though, without any default of his own, the acceptance should never reach him. But these consequences contradict the propositions 2 and 4, and are against all reason and convenience. The proposer cannot, at all events, act on the contract before the acceptance is communicated to him; as against him, therefore, a revocation is in time if it reaches him together with or before the original acceptance, whatever the relative times of their despatch. On

the other hand it is not reasonable that he should be bound by an acceptance that he never receives. He has no means of making sure whether or when his proposal has arrived (*a*), or whether it is or not accepted, for the other party need not answer at all. The acceptor may much more reasonably be left to take the risk of his acceptance miscarrying, for in practice he can easily take means, if he think fit, to provide against this (*b*). So far we have made no distinction between different modes of transmission. It seems to us, in fact, that such distinctions ought strictly to be immaterial, and that the principles of general convenience above stated should override them. However, the rules of agency, or rather their analogy, are now commonly appealed to. The inconvenience and inconsistent results of this last method are easily shown.

Results of
treating it
as a ques-
tion of
agency.

(*a*) A. sends a messenger to B. to propose a contract to B. and bring back the answer. B. tells the messenger that he accepts. Here it would be generally admitted that the messenger is A.'s agent to receive the acceptance, and both parties are absolutely bound from the moment of the communication to the messenger. So that if B. sends an express charged with a revocation, who overtakes the messenger long before he has reached A., B. nevertheless remains bound, and if the messenger dies on the road, and A. never gets his message, A. nevertheless remains bound.

(*β*) A. sends a messenger to B. not charged to bring back the answer, and B. sends an acceptance by another messenger of his own. This messenger, it would be generally said, is only B.'s agent to communicate the acceptance to A., and neither party is bound at all before its actual communication. Therefore in the cases put above the results will be directly the reverse (and so far less inconvenient); but then if A. sends a revocation which crosses B.'s acceptance, and is delivered to B. before B.'s messenger delivers the acceptance to A., the proposal is effectually revoked, which is even more inconvenient. It may be suggested, however, that A., by the mere fact of his making the proposal

(*a*) The German post-office, however, undertakes (if required at the time of posting) to furnish the sender of any letter with an official certificate of its delivery.

(*b*) Cp. on this subject Bramwell, B., L. R. 6 Ex. at p. 118, and a letter signed J. F. S. in the *Pall Mall Gazette* of Nov. 18, 1874.

and not prescribing any special way of transmitting the answer, must be taken to authorize B. to send his answer by any competent agent ; and it would not be a very violent fiction to say that A. thereby makes the agent so employed by B. his own agent to receive the acceptance. If the subject is to be treated in such an artificial manner at all this would put the case on the same footing as (a), and at least give a uniform rule, though not a very satisfactory one.

(γ) The proposal and acceptance are communicated through the post. This is the common case in modern times, and that which has given rise to difficulties in practice. A peculiar character has been attributed to communications made through the post, and it has been discussed whether the post-office is the agent of one or both parties ; unavoidably perhaps, but with little profit. It would have been better, had it been possible, to treat the post-office simply as a *prima facie* reasonable mode of communication (whether by letter or by telegraph), and to say nothing about agency. What is the actual state of the law cannot be laid down with much confidence, and we must proceed to gather it as we best can from a review of the cases.

The first and perhaps still the leading case on the matter is *Adams v. Lindsell* (a). Defendants wrote to plaintiffs, " We now offer you 800 tods of wether fleeces, &c." (specifying price and mode of delivery and payment), "receiving your answer in course of post." Here, therefore, the mode and time for acceptance were prescribed. This letter was misdirected, and so arrived late. On receiving it, the plaintiffs wrote and sent by post a letter accepting the proposal, but the defendants, not receiving an answer when they should have received it if their proposal had not been delayed, had in the meantime (between the despatch and the arrival of the reply) sold the wool to another buyer. The jury were directed at the trial that as the delay was occasioned by the neglect of the defendants, they must take it that the answer did come back by course of post. On the argument of a rule for a new trial, it was contended that there was no contract till the answer was received. To this the Court replied :

(a) 1 B. & Ald. 681. We need not stop at an earlier and strangely confused dictum of Lord Eldon's, *Kennedy v. Lee*, 3 Mer. 441, 454, which means, if anything, that a contract can never be complete by

correspondence unless a reasonable time has elapsed after the communication of the acceptance without an expression of dissent from either party.

Review of cases on contracts by post. *Adams v. Lindsell*.

"If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it ; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post."

Effect of
the deci-
sion.

This last passage of the judgment, deliberately confirming the direction given to the jury, has hardly been allowed its full weight in later cases. It certainly seems to admit that the receipt of the acceptance is not immaterial, though when it is received the contract dates from the posting. No doubt it is capable of being construed as applying only to a case where the proposed contract is in terms made conditional on an answer being received by return of post. But it seems to us that such a construction is too narrow, and that fairly considered the case amounts to this : An acceptance by letter is complete as against the proposer from the date of posting the acceptance if it arrives within the prescribed time, if any, or otherwise within a reasonable time ; but if the communication of the proposal is delayed by the fault of the proposer, and the communication of the acceptance is consequently delayed, such delay is not to be reckoned against the acceptor. This covers the greater part, if not the whole, of the propositions above marked (2) and (3) ; but it must be admitted that later judgments have gone some way to cut it down.

Dunmore
v. Alexan-
der (Sc.).

In the Scotch case of *Dunmore v. Alexander*, 9 Shaw & Dunlop, 190, an acceptance and revocation were written at different times but posted and received at the same time : held that the revocation was effectual. No distinction was taken between postal and other communications (a).

Potter v.
Sanders.

Potter v. Sanders, 6 Ha. 1, seems to add nothing to *Adams v. Lindsell* ; the posting of a letter of acceptance is said to be an act

(a) The French Court of Cassation similarly held in 1813 that when an acceptance and the revocation of it arrive together there is no contract.

Merlin, *Répertoire, Vente*, § 1, Art. 3, no. 11 *bis*, Langdell Sel. Ca. Cont. 155.

which "unless interrupted in its progress" concludes the contract as from the date of the posting.

Then comes *Dunlop v. Higgins*, 1 H. L. C. 381, a Scotch appeal decided by Lord Cottenham. Here the proposal did not prescribe any time, but the nature of it (an offer to sell iron) implied that the answer must be speedy. The acceptance was posted, not by the earliest possible post, but in business hours on the same day when the proposal was received. The post was then delayed by the state of the roads, so that the acceptance was received at 2 p.m. instead of 8 a.m., the hour at which that post should have arrived. The decision was that the contract was binding on the proposer; and it might well have been put on the ground that the acceptance in fact reached him within a reasonable time. Lord Cottenham however certainly seems to have thought the contract was absolutely concluded by the posting of the acceptance (within the prescribed or a reasonable time) and that it mattered not what became of the letter afterwards. And in *Duncan v. Topham*, 8 C. B. 225, not long afterwards, Wilde, C. J., Maule, J., and Cresswell, J., seem to have so understood it, so that the contract would be binding though the letter did not arrive at all: but the decision was on other grounds (a).

The later cases have arisen out of applications for shares in companies being made and answered by letter. *Hebb's case*, 4 Eq. 9, decides only that an allotment of shares not communicated at all will not make a man a shareholder; for the letter of allotment was sent to the company's local agent, who did not deliver it to the applicant till after he had withdrawn his application. Lord Romilly however said in the course of his judgment: "*Dunlop v. Higgins* decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is that the post-office is the common agent of both parties." But the same judge held in *Reidpath's case*, 11 Eq. 86, that the applicant was not bound if he never received the letter.

In *British and American Telegraph Company v. Colson*, L. R. 6 Ex. 108, it was found as a fact that the letter of allotment was never received. The Court held that the defendant was not bound, and endeavoured to restrict the effect of *Dunlop v. Higgins*. The judgments of Kelly, C. B. (in which Pigott, B., concurred), and of Bramwell, B., are rather differently expressed on this point. On the whole they seem to interpret *Dunlop v. Higgins* thus:—When a proposal is to be answered by post (which is generally to be inferred from the fact

(a) S. C. 18 L. J. C. P. 310, where this point does not appear; see L. R. 6 Ex. 115, 120, 7 Oh. 596.

of the proposal itself being sent by post), the time allowed for the answer is to be taken as subject to unavoidable delays in the course of the post ; but it does not follow that an answer not delivered at all is an effectual acceptance.

Town-
send's ca.

In *Townsend's* case, 13 Eq. 148, the letter of allotment miscarried and was delayed some days by the applicant's own fault in giving a defective address. By a simple application of *Adams v. Lindæll* (expressly so treated in the judgment, p. 154) it was held that the applicant was bound, and that a withdrawal of his application, posted (and it seems delivered, p. 151) before he actually received the letter of allotment was too late. The case in the Exchequer was incidentally recognized as an authority.

Harris' ca.

In *Harris'* case, 7 Ch. 587, the letter of allotment was duly received, but in the meantime the applicant had written a letter withdrawing his application on the ground of the delay (ten days) in answering it. These letters crossed. The Lords Justices held that the applicant was bound, on the authority of *Dunlop v. Higgins*, with which they thought it difficult to reconcile *British and Amer. Telegraph Co. v. Colson* (a). On this, however, no positive opinion was given, "because although the contract is complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent that if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted" (per Mellish, L. J., at p. 597). This would secure the proposer against hardship ; but still a revocation of the acceptance by telegram would be inoperative, contrary to our former proposition (4). However, this must probably be taken as the best expression of the existing law that can be arrived at.

Wall's ca.

In *Wall's* case, 15 Eq. 18, the Court held that as a fact the letter had been received, inclining, however, to think *Harris'* case an authority for the extreme construction of *Dunlop v. Higgins*—viz., that the contract is absolute and unconditional by the mere posting.

Ex parte Cote, 9 Ch. 27, although the particular case is on quite different points from the present, is worth consulting on the general question of the legal character of the post-office as an agent of senders and receivers of letters.

It will be seen that, as we have above said, the apparent conflict between these authorities arises from the assumption that some one

(a) It seems not to have been disputed that the letter of allotment was in fact sent within a reasonable time.

moment of time must be fixed from which both parties are bound absolutely ; an assumption, however, which is so much involved in the language of the decisions, that it cannot in practice be disregarded, though there is nothing to prevent a Court of Appeal, at any rate, from sweeping it away. It will further be seen that in any view of the results there is nothing to prevent the proposer of a contract from guarding himself by making the proposal expressly conditional on the arrival of an answer, not by return of post or in course of post, but within some definite time. In such a case it is apprehended that an answer arriving later, from whatever cause, would not constitute a contract.

Besides these we have an important American case, *Taylor v. Merchants' Fire Insurance Co.*, 9 How. S. C. 390, decided by the Supreme Court in 1850. The insurance company's agent wrote to the plaintiff offering to insure his house on certain terms. The plaintiff wrote and posted a letter accepting these terms, which was duly received. The day after it was posted, but before it was delivered, the house was burnt. The objection was made, among others, that there was no complete contract before the receipt of the letter, an assent of the company after the acceptance of the proposed terms being essential. But the Court held that such a doctrine would be contrary to mercantile usage and understanding, and defeat the real intent of the parties. This decides that a contract is complete as against the proposer by posting a letter which is duly delivered. It may be useful to cite part of the judgment :—

“The fallacy of the argument, in our judgment, consists in the assumption that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show that in all cases of contracts entered into between parties at a distance by correspondence it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present. . . It is obviously impossible ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. . . It seems to us more consistent with the acts and declarations of the parties to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated, instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

“For why make the offer, unless intended that an assent to its terms should bind them ? And why require any further assent on their

part after an unconditional acceptance by the party to whom it is addressed ?" (a). (pp. 400, 401.)

This decision seems to add little if anything to *Adams v. Lindsell*, unless the narrowest possible view be taken of that case.

**Indian
Contract
Act.**

The Indian Contract Act deals with the subject in the following manner :

Chapter I. Of the Communication, Acceptance and Revocation of Proposals.

"3. The communication of proposals, acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting, or revoking, by which he intends to communicate such proposal, acceptance, or revocation, or which has the effect of communicating it."

[It would be difficult to find any such general statement in the English authorities ; and the language of this section is perhaps open to criticism. A little reflection will show, however, that the substance of it is taken for granted in the whole treatment of questions of contract in our books.]

"4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor ; as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ; as against the person to whom it is made, when it comes to his knowledge.

Illustrations.

(a). A. proposes by letter to sell a house to B. at a certain price. The communication of the proposal is complete when B. receives the letter.

(b). B. accepts A.'s proposal by a letter sent by post. The communication of the acceptance is complete as against A. when the letter is posted ; as against B. when the letter is received by A.

(c). A. revokes his proposal by telegram. The revocation is complete as against A. when the telegram is despatched. It is complete as against B. when B. receives it.

(a) Another extract (partly coinciding with this) will be found in Mr. Benjamin's work (56-7). Other

American cases are collected in an article on Contract by Letter, 7 Amer. Law Review, 433.

B. revokes his acceptance by telegram. B.'s revocation is complete as against B. when the telegram is despatched, as against A. when it reaches him.

" 5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is completed as against the acceptor, but not afterwards.

Illustration.

A. proposes, by a letter sent by post, to sell his house to B. B. accepts his proposal by a letter sent by post. A. may revoke his proposal at any time before, or at the moment when B. posts his letter of acceptance, but not afterwards.

B. may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A., but not afterwards.

" 6. A proposal is revoked

(1.) By the communication of notice of revocation by the proposer to the other party ;

(2.) By the lapse of the time prescribed in such proposal for its acceptance, or if no time is so prescribed, then by the lapse of a reasonable time, without communication of the acceptance [this seems intended, notwithstanding the unqualified language of s. 5, to cover the case of an acceptance sent by post being lost or seriously delayed].

(3.) By the failure of the acceptor to fulfil a condition precedent to acceptance ; or,

(4.) By the death *or insanity* of the proposer, *if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.*"

[Of this presently: the words in italics do not represent English law.]

In the modern civil law the subject has apparently been found no less troublesome than with us. Pothier's and Vangerow's opinions have already been referred to. From the last-named author it appears that there is much conflict among German writers of repute ; one or two seem to have arrived (though in one case by a highly artificial course) at results equivalent to those of the Indian Act (Vangerow, Pand. § 603, 3. 248, 251). Savigny holds that, as a matter of private international law, the place where a contract by correspondence is concluded is that from which the acceptance is despatched (Syst. 8. 235, 257) (a) : but he does not further enter on the question.

(a) So, where a proposal was written and posted in one county court district, and received and accepted in another, the Court of Q. B. held that the whole cause of action arose in the district where it was

Agreement to take shares not exceptionally treated.

Throughout the foregoing discussion it has been assumed, as being rather a part of the notion of contract than an inference from it, that there can be no contract unless the person accepting the proposal at least does all he can to communicate the acceptance. It was supposed at one time that the Companies Act, 1862, had introduced a different rule in the case of agreements to take shares, and that an applicant for shares became a shareholder by mere allotment and registration, though nothing were done to give notice to him ; but it is now settled that this is not so ; the ordinary rules as to the formation of contracts must be applied (*a*).

Acceptance won't relate back though retrospective in form.

We have seen that in general the contract dates from the acceptance ; and though the acceptance be in form an acknowledgment of an existing agreement, yet this will not make the contract relate back to the date of the proposal, at all events not so as to affect the rights of third persons (*b*).

Death of proposer : *semble*, an absolute revocation though not known to other party.

There is believed to be one positive exception in our law to the rule that the revocation of a proposal takes effect only when it is communicated to the other party. This exception is in the case of the proposer dying before the proposal is accepted. This event is in itself a revocation, as it makes the proposed agreement impossible by removing one of the persons whose consent would make it (*c*). There is no distinct authority to show whether notice to the other party is material or not ; but in the analogous case of agency the death of the principal in our law, though not in the civil law, puts an end *ipso facto* to the agent's authority, without regard to the time when it becomes known either to the agent or to third parties (*d*). It would probably be impossible not to follow the analogy of this doctrine. The Indian Act, as we have seen, makes the knowledge of the other

received. *Newcomb v. de Roos*, 2 E. & E. 270, 29 L. J. Q. B. 4. Conversely, where an offer to buy goods is made by a letter posted in the city of London, and accepted by sending the goods to the writer's place of business in the city, the whole cause of action arises in the city. *Taylor v. Jones*, 1 C. P. D. 87.

(*a*) *Gunn's ca.*, 3 Ch. 40.

(*b*) *Fellhouse v. Bindley*, 11 C. B.

N. S. 869, 31 L. J. C. P. 204.

(*c*) Per Mellish, L. J., in *Dickinson v. Dodds*, 2 Ch. D. at p. 475.

(*d*) *Blades v. Free*, 9 B. & C. 167 ; *Campanari v. Woodburn*, 15 C. B. 400, 24 L. J. C. P. 13, 2 Kent Comm. 646, D. 46, 3, de solut. et liberat. 32. The Indian Contract Act, s. 208, illust. (*c*), adopts the rule of the civil law.

party before acceptance a condition of the proposal being revoked by the proposer's death. As for insanity, which is treated in the same way by the Indian Act, that would not operate as a revocation in any case by the law of England, for we shall see that the contract of a lunatic (not so found by inquisition) is only voidable even if his state of mind is known to the other party.

Insanity
no revoca-
tion.

The next rule is in principle an exceedingly simple one. It is that

5. "In order to convert a proposal into a promise the acceptance must be absolute and unqualified" (a).

Accept-
ance must
be unquali-
fied.

For unless and until there is such an acceptance on the one part of terms proposed on the other part, there is no expression of one and the same common intention of the parties, but at most expressions of the more or less different intentions of each party separately—in other words, proposals and counter-proposals. Simple and obvious as the rule is in itself, the application to a given set of facts is not always obvious, inasmuch as contracting parties often use loose and inexact language, even when their communications are in writing and on important matters. It will readily be seen that the question whether the language used on a particular occasion does or does not amount to an acceptance is wholly a question of construction, and generally though not necessarily the construction of a written instrument. The cases in which such questions have been decided are numerous (b), and we shall here give by way of illustration only a few of the most recent ones (c).

In *Honeyman v. Marryat* (d), before the House of Lords, a proposal for a sale was accepted "subject to the terms of a contract being arranged" between the vendor's and purchaser's solicitors: this was clearly no contract.

Recent in-
stances of
insufficient
accept-
ance.

In *Appleby v. Johnson* (e), the plaintiff wrote to the defendant, a calico-printer, and offered his services as salesman on certain terms, among which was this: "a list of the merchants to be regularly

(a) Indian Contract Act, s. 7, sub-s. 1.

(b) For collected authorities see (*inter alia*) Fry on Specific Performance, c. 2, pp. 75 *sqq.*

(c) Cp. also the French case in the Court of Cassation given in Mr.

Langdell's selection, and already referred to on another point.

(d) 6 H. L. C. 112, by Lord Wensleydale. The case was not argued, no one appearing for the appellant.

(e) L. R. 9 C. P. 153.

called on by me to be made." The defendant wrote in answer: "Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; but I think we are quite agreed on all. We shall therefore expect you on Monday. (Signed)—J. Appleby.—P.S.—I have made a list of customers which we can consider together." It was held that on the whole and especially having regard to the post-script, which left an important term open to discussion, there was no complete contract. . . "Where a contract is to be made out," said Grove, J., "by an offer on one side and an acceptance on the other, if the answer is equivocal or anything is left to be done, the two do not constitute a binding contract. . . The second letter refers to terms which required to be further considered to make a final agreement. If the acceptance is not clear and certain, but leaves something to be arranged, something for future discussion and decision, the parties are not *ad idem*" (a).

In *Crossley v. Maycock* (b) an offer to buy certain land was accepted, but with reference to special conditions of sale not before known to the intending purchaser. Held only a conditional acceptance.

In *Stanley v. Dowdeswell* (c) an answer in this form: "I have decided on taking No. 22, Belgrave Road, and have spoken to my agent Mr. C., who will arrange matters with you," was held insufficient to make a contract, as not being complete and unqualified, assuming (which was doubtful) that the letter of which it was part did otherwise sufficiently refer to the terms of the proposal.

In *Addinell's* case (d) and *Jackson v. Turquand* (e), a bank issued a circular offering new shares to existing shareholders in proportion to their interests, and also asking them to say if in the event of any shares remaining they should wish to have any more. Certain shareholders wrote in answer, accepting their proportion of shares, and also desiring to have a certain number of additional shares, if they could, on the terms stated in the circular. In reply to this the directors sent them notices that the additional shares had been allotted to them, and the amount must be paid to the bank by a day named, or the shares would be forfeited. It was held by Kindersley, V.-C., and confirmed by the House of Lords, that as to the first or proportional set of shares the shareholder's letter was an acceptance constituting a contract, but as to the extra shares it was only a proposal; and that as the directors' answer introduced a material new term (as to forfeiture of the shares if not paid for within a certain time), there was no binding contract as to these.

(a) L. R. 9 C. P. 163-4.

(b) 18 Eq. 180.

(c) L. R. 10 C. P. 102. Compare

Smith v. Webster, 3 Ch. D. 49.

(d) 1 Eq. 225.

(e) L. R. 4 H. L. 305.

In *Wynne's* case (a) two companies agreed to amalgamate. The agreement was engrossed in two parts, and contained a covenant by the purchasing company to pay the debts of the other. But the purchasing company (which was unlimited) before executing its own part inserted a proviso limiting the liability of its members under this covenant to the amount unpaid on their shares. This being a material new term, the variance between the two parts as executed made the agreement void. In this, and later in *Beck's* case (b), in the same winding up, a shareholder in the absorbed company applied for shares in the purchasing company credited with a certain sum according to the agreement, and received in answer a letter allotting him shares to be credited with a "proportionate amount of the net assets" of his former company. It was held that, apart from the question whether the allotment was conditional on the amalgamation being valid, there was no contract to take the shares.

On the other hand the following instances will show that the rule must be cautiously applied. An acceptance may be complete though it expresses dissatisfaction at some of the terms, if the dissatisfaction stops short of *dissent*, so that the whole thing may be described as a "grumbling assent" (c). Instances of sufficient acceptance.

Again, an acceptance is of course not made conditional by adding words that in truth make no difference; as where the addition is simply immaterial (d), or a more formal memorandum is enclosed for signature, but not shown to contain any new term (e). And further, if the person answering an unambiguous proposal accepts it with the addition of ambiguous words, which are capable of being construed consistently with the rest of the document and so as to leave the acceptance absolute, they will if possible be so construed (f). And perhaps it is in like manner open to the accepting party to disregard an insensible or repugnant qualification annexed to the proposal: as where a man offers to take shares in a company, "if limited," which in contemplation of law he must know to be not limited, and the directors allot shares and notify the allotment to him without taking any notice of the attempted qualification. But in the case referred to this view is not necessary to the result; for the applicant wrote a second letter recognizing the allotment. The letter of allotment might therefore be treated as a counter-proposal,—viz., to allot shares in a company not limited—of which this last was the

(a) 8 Ch. 1002.

(b) 9 Ch. 392.

(c) *Joyce v. Swann*, 17 O. B. N. S. 84: cp. per Lord St. Leonards, 6 H. L. C. 277-8 (in a dissenting judgment).

(d) *Clive v. Beaumont*, 1 De G. &

S. 397.

(e) *Gibbons v. N. E. Metrop. Asylum District*, 11 Beav. 1.

(f) *English & Foreign Credit Co. v. Arduin*, L. R. 5 H. L. 64; per Lord Westbury at p. 79.

acceptance (a). And in fact there is one case somewhat against the view here suggested : the letter of allotment was headed "not transferable," apparently through a mere mistake of law, so that on a fair construction it would seem to have been, not a really conditional acceptance, but an acceptance with an imaginary and illusory condition, wrongly supposed to be implied in the nature of the transaction: but it was held that no contract was constituted (b).

Again, the unconditional acceptance of a proposal is not deprived of its effect by the existence of a misunderstanding between the parties in the construction of collateral terms which are not part of the agreement itself (c).

Parties
may post-
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contract,
though
agreed on
the terms,
till embod-
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mal instru-
ment.

One further caution is needed. All rules about the formation and interpretation of contracts are subject to the implied proviso, "unless a contrary intention of the parties appears." And it may happen that though the parties are in fact agreed upon the terms—in other words, though there has been a proposal sufficiently accepted to satisfy the general rule—yet they do not mean the agreement to be binding in law till it is put into writing or into a formal writing. If such be the understanding between them, of course they are not to be sooner bound against both their wills. "If to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation" (d). Whether such is in truth the understanding is a question of fact which depends on the circumstances of each particular case (e).

It is not to be supposed, "because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made ; but the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement" (f) : as for instance where conditions of sale expressly provide that the purchaser "will be required to sign a

(a) *Perrett's ca.*, 15 Eq. 250.

(b) *Duke v. Andrews*, 2 Ex. 290.

(c) *Baines v. Woodfall*, 6 C. B. N. S. 657, 28 L. J. C. P. 338. The facts unfortunately do not admit of abridgment.

(d) *Chinnock v. Marchioness of*

Ely, 4 D. J. S. 638, 646.

(e) See next note.

(f) *Ridgway v. Wharton*, 6 H. L. C. 238, 264, 268, per Lord Cranworth, C., and see per Lord Wensleydale at pp. 305-6.

contract embodying the foregoing conditions" (a). James, L. J., has lately expressed disapproval of the practice of construing mere negotiations into contracts. "On several occasions parties have found themselves entrapped into a binding contract when they never considered themselves to have entered into any agreement, but thought they were settling only one term of the contract—the price" (b).

6. An agreement is not a contract unless its terms are certain or capable of being made certain. Agreement must be certain.

For the Court cannot enforce an agreement without knowing what the agreement is. Such knowledge can be derived only from the manner in which the parties have expressed their intention. If that expression has no definite meaning, there is nothing to go upon. The parties may have come to a real agreement, but they must take the consequences of not having made it intelligible. Thus a promise by the buyer of a horse that if the horse is lucky to him, he will give 5*l.* more, or the buying of another horse, is "much too loose and vague to be considered in a court of law." "The buying of another horse" is a term to which the Court cannot assign any definite meaning (c). Questions of this kind, however, as well as those we spoke of in the last paragraph, arise chiefly where the alleged contract is evidenced by writing; and further the importance of the rule depends chiefly if not wholly on the more general rule of evidence which forbids the contents or construction of an instrument in writing to be varied or supplemented by word of mouth. Certain aspects of this rule will come before us in a later chapter. On the rules of construction in general we do not enter; but we may mention shortly as a thing to be borne in mind, that words are to be taken in the sense in which they were understood by the parties using them; and that, in the absence of anything to show that a different meaning was contemplated, is the sense in which a reasonable man acquainted with the subject-matter would understand them. The question then is, can such a sense be arrived at with reasonable certainty?

(a) *Rossiter v. Miller* (C. A.), 5 Ch. D. 648. See too *Chinnock v. Marchioness of Ely*, *supra*. *Rossiter v. Miller*, 5 Ch. D. at p. 658.

(b) *Smith v. Webster*, 3 Ch. D. at p. 56; to the same effect, again, in

(c) *Guthing v. Lynn*, 2 B. & Ad. 232.

One or two instances will serve as well as many. An agreement to sell an estate, reserving "the necessary land for making a railway," is too vague (*a*). An agreement to take a house "if put into thorough repair," and if the drawing-rooms were "handsomely decorated according to the present style" has also been dismissed as too uncertain to be enforced (*b*). One might at first sight think it not beyond the power of a reasonable man or twelve reasonable men fairly acquainted with dwelling-houses to say whether the repairs and decorations executed in a particular house do or do not answer the above description. It must be observed, however, that this was a suit for specific performance; and a court of equity may and sometimes does decline to grant that remedy on the ground that the existence of a concluded contract is very doubtful, but without undertaking to decide that no contract exists. Formerly, indeed, it was the rule with courts of equity to leave questions of legal right open as much as possible, but the modern tendency is the other way.

**Illusory
promises.**

To this head those cases are perhaps best referred in which the promise is illusory, being dependent on a condition which in fact reserves an unlimited option to the promisor. "Nulla promissio potest consistere, quae ex voluntate promittentis statum capit" (*c*). Thus where a committee had resolved that for certain services "such remuneration be made as shall be deemed right," this gave no right of action to the person who had performed the services; for the committee alone were to judge whether any or what recompense was right (*d*). Moreover a promise of this kind, though it creates no enforceable contract, is so far effectual as to exclude the promisee from falling back on any contract to pay a reasonable remuneration which would be inferred from the transaction if there were no express agreement at all.

In *Roberts v. Smith* (*e*) there was an agreement between A. and B. that B. should perform certain services, and that in one event (let us say no. 1) A. should pay B. a certain salary, but that in another event (no. 2) A. should pay B. whatever A.

(*a*) *Pearce v. Watts*, 20 Eq. 492.

(*b*) *Taylor v. Portington*, 7 D. M. G. 328.

(*c*) D. 45. 1. de verb. obl. 108, § 1.

(*d*) *Taylor v. Brewer*, 1 M. & S.

290.

(*e*) 4 H. & N. 315, 28 L. J. Ex.

164.

might think reasonable. Event no. 2 having happened, the Court held there was no contract which B. could enforce. Services had indeed been rendered, and of the sort for which people usually are paid and expect to be paid; so that in the absence of express agreement there would have been a good cause of action for reasonable reward. But here B. had expressly assented to take whatever A. should think reasonable (which might be nothing), and had thus precluded himself from claiming to have whatever a jury should think reasonable. It is submitted, however, that it would not be safe to infer from this case that under no circumstances whatever can a promise to give what the promisor shall think reasonable amount to a promise to give a reasonable reward, or at all events something which a jury can find not to be illusory. The circumstances of each case (or in a written instrument the context) must be looked to for the real meaning of the parties: and "I leave it to you" may well mean in particular circumstances (as in various small matters it notoriously does) "I expect what is reasonable and usual, and I leave it to you to find out what that is," or "I expect what is reasonable, and am content to take your estimate (assuming that it will be made in good faith and not illusory) as that of a reasonable man."

Another somewhat curious case of an illusory promise (though mixed up to some extent with other doctrines) is *Moorhouse v. Colvin* (a). There a testator, having made a will by which he left a considerable legacy to his daughter, wrote a letter in which he said, after mentioning her other expectations, "this is not all; she is and shall be noticed in my will, but to what further amount I cannot precisely say." The legacy was afterwards revoked. It was contended on behalf of the daughter's husband, to whom the letter had with the testator's authority been communicated before the marriage, that there was a contract binding the testator's estate to the extent of the legacy given by the will as it stood at the date of the letter. But it was held that the testator's language expressed nothing more than a vague intention, although it would have been binding had it referred to the specific sum then standing in the will, so as to fix that sum as a minimum to be expected at all events.

(a) 15 Beav. 341, 348; affd. by L. JJ., *ib.* 350, n.

"He expressly promises such provision only as he in his will and pleasure shall think fit. If, on her marriage, the testator had said, 'I will give to my child a proper and sufficient provision,' the Court might ascertain the amount; but if the testator had said, 'I will give to my child such a provision as I shall choose,' would it be proper for the Court (if he gave nothing) to say what he ought to have given?"

Implied
proposal or
accept-
ance.

7. The proposal or acceptance of an agreement may be communicated by conduct as well as by words; and proposals and acceptances so communicated are governed, as near as may be, by the same rules as if they had been made in express words.

It would be as difficult as it is needless to adduce distinct authority for this proposition. Cases are of constant occurrence, and naturally in small matters rather than in great ones, where the proposal, or the acceptance, or both, are signified not by words but by acts. For example, the passenger who steps into a ferry-boat thereby requests the ferryman to take him over for the usual fare, and the ferryman accepts this proposal by putting off.

A promise made in this way is said to be implied: it seems preferable, however, to use the word *inferred*, to distinguish the real though tacit promise in these cases from the fictitious promise "implied by law," as we shall immediately see, in certain other cases where there is no real contract at all, but an obligation *quasi ex contractu*. Sometimes, no doubt, it is difficult to draw the line between the two. "Where a relation exists between two parties which involves the performance of certain duties by one of them, and the payment of reward to him by the other, *the law will imply* [quasi-contract] *or the jury may infer* [true contract] a promise by each party to do what is to be done by him" (a). It was held in the case cited that an innkeeper promises in this sense to keep his guests' goods safely. The case of a carrier is analogous. So where A. does at B.'s request something not apparently illegal or tortious, but which in fact exposes A. to an action at the suit of a third person, it seems to be not a proposition of law, but an inference of fact which a jury may reasonably find, that B. must be taken to have promised to indemnify A. (b).

(a) Per Cur. *Morgan v. Ravey*, 6 H. & N. 265, 30 L. J. Ex. 131.

(b) *Dugdale v. Lovering*, L. R. 10 C. P. 196.

Tacit proposals and acceptances must, like express ones, be communicated. If A. with B.'s knowledge, but without any express request, does work for B. such as people as a rule expect to be paid for, if B. accepts the work or its result, and if there are no special circumstances to show that A. meant to do the work for nothing, or that B. honestly believed that such was his intention, there is no difficulty in inferring a promise by B. to pay what A.'s labour is worth. And this is a pure inference of fact, the question being whether B.'s conduct has been such that a reasonable man in A.'s position would understand from it that B. meant to treat the work as if done to his express order. The doing of the work with B.'s knowledge is the proposal of a contract, and B.'s conduct is the acceptance. The like inference cannot be made if the work is done without B.'s knowledge. For by the hypothesis the doing of the work is not a proposal, not being communicated at the time : B. has no opportunity of approving or countermanding it, and cannot be bound to pay for it when he becomes aware of the facts, although he may have derived some benefit from the work ; it may be impossible to restore or reject that benefit without giving up his own property (a). Nor is the case altered if A. comes to B. and tells him that the work is done and requests to be paid for it. This is indeed a proposal, but a new and distinct one : and as it imports no new consideration, B.'s acceptance of it would be a merely gratuitous promise, and as such would make no contract.

Communi-
cation of
them ne-
cessary.
Distinc-
tion of
tacit con-
tracts from
quasi-
contracts.

But it does not follow that because there is no true contract, there may not be cases falling within this general description in which it is just and expedient that an obligation analogous to contract should be imposed upon the person receiving the benefit. In fact there are such cases : and as the forms of our common law did not recognize quasi-contracts in any distinct manner, these cases were dealt with by the fiction of an implied previous request, which often had to be supplemented (as in the action for money had and received) by an equally fictitious promise. The promise, actual or fictitious, was then supposed to relate back to the fictitious request, so that the transaction which was the real foundation of the matter was treated as forming the consideration in a fictitious contract of the regular type. And

Quasi-
contracts
appear as
fictitious
contracts
in English
law.

(a) Cp. *dicta* of Pollock, C. B., 25 L. J. Ex., at p. 332, Leake, 28.

Indian
Contract
Act deals
with them
separately.

thus here, as in many other instances, the law was content to rest in a compromise between the forms of pleading and the convenience of mankind. These fictions have long ceased to appear on the face of our pleadings, but they have become so established in legal language that it is still necessary to understand them. But we do not further pursue this topic (*a*). The Indian Act provides for matters of this kind more simply in form and more comprehensively in substance than our present law, by a separate chapter entitled "Of certain Relations resembling those created by Contract" (ss. 68-72, cp. s. 73).

Tacit ac-
ceptance
of contract
must be
unambi-
guous.
Cases of
special
conditions
on tickets.

Conduct which is relied on as constituting the acceptance of an actual contract, must (no less than words relied on for the same purpose) be unambiguous and unconditional (*b*).

Where the proposal itself is not express, then it must also be shown that the conduct relied on as conveying the proposal was such as to amount to a communication to the other party of the proposer's intention. Difficult questions may arise on this point, and in particular have arisen in cases where public companies entering into contracts for the carriage or custody of goods have sought to limit their liability by special conditions printed on a ticket delivered to the passenger or depositor at the time of making the contract. The tendency of the earlier cases on the subject is to hold that (apart from the statutory restrictions of the Railway and Canal Traffic Act, 1854, which do not apply to contracts with steamship companies, nor to contracts with railway companies for the mere custody as distinguished from the carriage of goods) such conditions are binding. A strong opposite tendency is shown in *Henderson v. Stevenson* (*c*), where the House of Lords decided that in the case of a passenger travelling by sea with his luggage an indorsement stating that the shipowners will not be liable for loss does not prevent him from recovering for loss caused by their negligence, unless it appears either that he knew and assented to the special terms, or at any rate that he knew there were some special terms and

(*a*) See notes to *Lampleigh v. Braithwaite*, 1 Sm. L. C. and *Osborne v. Rogers*, 1 Wms. Saund. 357.

(*b*) *Warner v. Willington*, 3 Drew. 523, 533.

(*c*) L. R. 2 Sc. & D. 470. Lord Chelmsford's and Lord Hatherley's

dicta (pp. 477, 479) go farther, and suggest that the contract is complete before the ticket is delivered at all, so that some other communication of the special terms would have to be shown.

was content to accept them without examination. Since this there have been two reported cases arising out of the deposit of goods at a railway company's cloak-room in exchange for a ticket, on which were indorsed conditions limiting the amount of the company's liability (a). The result, as it stands at present, appears to be that it is a question of fact in each case whether the notice given by the company was reasonably sufficient to inform the depositor at the time of making the contract that the company intended to contract only on special terms. A person who, knowing (or having reasonable means of knowing) (b) this, enters into the contract, is then deemed to assent to the special terms; but this, again, is probably subject to an implied condition that the terms are relevant and reasonable. The whole subject, however, still remains by no means free from uncertainty.

We now give the remaining sections of the Indian Contract Act as to Proposal and Acceptance:—

Further provisions of Indian Act as to proposal and acceptance.

“7. In order to convert a proposal into a promise, the acceptance must

(1) be absolute and unqualified [of this we have already spoken];

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance. [Cp. the late case of *Leather-Cloth Co. v. Hieronimus* (c). There goods were ordered to be sent by an unusual route for a special reason; this reason ceased to exist before the order could be executed, and the goods were sent by the usual route: the Court held that this, being acquiesced in by the buyer, was a sufficient performance of the original contract, and not of a substituted contract; and therefore no special memorandum of such alleged substituted contract was required to satisfy the Statute of Frauds (d)].

(a) *Harris v. G. W. R. Co.* 1 Q. B. D. 515, *Parker v. S. E. R. Co.*, *Gabell v. S. E. R. Co.*, 2 C. P. D. 416, revg. in *Parker's* case the judgment of the C. P. Div. 1 C. P. D. 618.

(b) It seems very difficult to maintain this on principle. Actual knowledge may of course be inferred as a fact from reasonable means of

knowledge.

(c) L. R. 10 Q. B. 140.

(d) See further, as to the difference between a substituted agreement and substituted performance, *Sanderson v. Graves*, L. R., 10 Ex. 234, *Hickman v. Haynes*, L. R. 10 C. P. 598; *Plerins v. Downing*, 1 C. P. D. 220.

"8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

"9. In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

The performance, &c., in s. 8, must of course, like an acceptance in any other manner or form, be communicated to the proposer. Subject to this caution, these sections are believed to represent English law with sufficient exactness to need no further comment.

German
Commer-
cial Code
on forma-
tion of
contracts.

Finally, it may be of some interest to compare with the English and Anglo-Indian law the provisions of the German Commercial Code as to the formation of contracts :

"318. When a commercial contract is proposed between parties present at the same time, the acceptance must be immediate ; otherwise the proposer is no longer bound to his proposal.†

319. When a proposal is on foot between parties at a distance, the proposer remains bound until the time at which he may fairly expect an answer to reach him, if despatched in ordinary course and in due time.† In estimating this time he may assume that his proposal was duly received [surely not if, as in *Adams v. Lindsell* (a), it was delayed by his own negligence ?]

In the event of an acceptance despatched in due time not arriving till after such time as aforesaid, no contract is concluded, if the proposer has given notice of revocation in the meantime, or gives it forthwith (*ohne Verzug*) on receiving the acceptance."

[The clauses marked † seem only to say, in a rather elaborate way, that a proposal is revoked by the lapse of a reasonable time without acceptance ; s. 319, however, tacitly involves the important proposition that an answer which never arrives, whether sent by post or otherwise, cannot conclude a contract.]

320. When the revocation of a proposal reaches the other party before or at the same time with the proposal itself, the proposal is deemed null and void (*ist für nicht geschehen zu erachten*).

In like manner the acceptance is deemed null and void if the revocation has been communicated to the proposer before the acceptance, or at the same time with it.

(a) 1 B. & Ald. 681, p. 13 *sup*.

321. Where an agreement has been concluded between parties at a distance, the conclusion of the agreement is to be dated from the time at which the communication of the acceptance was delivered for despatch [*sc.* out of the acceptor's control] (*in welchem die Erklärung der Annahme Behufs der Absendung abgegeben ist*).

322. An acceptance subject to conditions or reservations is equivalent to a refusal coupled with a new proposal."

CHAPTER II.

CAPACITY OF PARTIES.

PART I.—OF NATURAL PERSONS.

I. INFANTS.

Infants— THE exceptions to the capacity of natural persons to bind themselves by contract are infancy, coverture, and insanity. Of these **Incapacity to bind themselves** in order.

by contract. General statement of the law. An infant, *i.e.*, a person less than twenty-one years old (Co. Lit. 171 *b*), is not absolutely incapable of binding himself, but is, generally speaking, incapable of absolutely binding himself by contract (*a*). His acts and contracts are voidable at his option, subject to certain statutory and other exceptions, which are partly definite, partly not definable in terms but capable of reasonable definition in practice, and partly both indefinite and doubtful. The following seems the nearest approach to a statement in general terms that can safely be made.

By the common law a contract made by an infant is generally voidable at the infant's option, such option to be exercised either before (*b*) his attaining his majority or in a reasonable time afterwards.

Where the obligation is incident to an interest (or at all events to a beneficial interest) in property, it cannot be avoided while such interest is retained.

Exceptions—

A. Void agreements.

By the Infants' Relief Act, 1874, loans of money to infants, contracts for the sale to them of goods other than necessities,

(*a*) Stated in this form by Hayes, J., 14 Ir. C. L. R., at p. 356.

(*b*) As to this see p. 42.

and accounts stated with them are absolutely void: and no action can be brought on a ratification of *any* contract made during infancy.

(When the agreement of an infant is such that it cannot be for his benefit, it is said to be absolutely void at common law; but this distinction is exceedingly doubtful, if not altogether exploded by modern authorities.)

B. Valid contracts.

An infant's contract is valid if it appears to the Court to be beneficial to the infant, and in particular if it is for necessities.

Explanation.—"Necessaries" include all such goods, commodities, and services as are reasonably necessary for the use and benefit of a person in the circumstances and condition of life of the contracting party.

Moreover in certain cases infants are enabled to make binding contracts by custom or statute.

An infant is not liable for a wrong arising out of or immediately connected with his contract, such as a fraudulent representation at the time of making the contract that he is of full age. But an infant who has represented himself as of full age is in a Court of Equity bound by payments made and acts done at his request and on the faith of such representations, and is liable to restore any advantage he has obtained by such representations to the person from whom he has obtained it.

We proceed to speak in detail of the different parts of the subject, and

1. Of the contracts of infants in general at common law, and as affected by the Act of 1874. It will be convenient to depart somewhat from the order of the foregoing general statement for the purpose of considering this whole subject together. It is commonly said that an agreement made by an infant, if such that it cannot be for his benefit, is not merely voidable, but absolutely void; though in general his contracts are only voidable at his option (*a*). This distinction, it is submitted, is in itself unreasonable, and is supported by little or no real authority,

Of infants' contracts in general: and as to supposed distinction that some are wholly void.

(*a*) Another distinction is made as to deeds taking complete effect by delivery or otherwise. See Shepp. Touchst. 233; Co. Lit. 51 b, note;

3 Burr. 1805; 2 Dr. & W. 340. But this is of little practical importance, and not material to the present subject.

while there is considerable authority against it. The unreasonableness of it seems hardly to need any demonstration. The object of the law, which is the protection of the infant, is amply secured by not allowing the contract to be enforced against him during his infancy, and leaving it in his option to affirm or repudiate it at his full age (*a*). Moreover the distinction is arbitrary and doubtful, for it must always be difficult to say whether a particular contract cannot possibly be beneficial to the party. As for the authorities, the word *void* is no doubt frequently used : but then it is likewise to be found in cases where it is quite settled that the contract is in truth only voidable. And as applied to other subject-matters it has been held to mean only *voidable* in formal instruments (*b*) and even in Acts of Parliament (*c*). The fact is (as was justly remarked in the argument of a modern case we shall presently cite) that there is "a constant confusion in the books," and sometimes even in recent books, "between *void* and *voidable*" (*d*), so that the language of text-writers, of judges, and even of the legislature, is no safe guide apart from actual decisions.

Examina-
tion of au-
thorities :
as to bonds.

But when we look at the decisions they appear to establish in the cases now in question only that the contract cannot be enforced against the infant, or some other collateral point equally consistent with its being only voidable, except when they show distinctly that the contract is voidable and not void. Thus an infant's bond with a penalty and conditioned for the payment of interest has been supposed to be wholly void ; but nothing more is decided than that being under seal it cannot be ratified save by an act of at least equal solemnity with the original instrument : in the case referred to one judge (Bayley, J.) rested his judgment simply on the law stated by Coke, who only says that an infant's bond with a penalty, even if given for necessities, shall not bind him (*e*). A stronger case is *Thornton v. Illingworth* (*f*), where the judges said in terms that an infant's con-

(*a*) We are now speaking only of the common law.

(*b*) *Lincoln College's ca.* 3 Co. Rep. 59*b* ; *Doe d. Bryan v. Bancks*, 4 B. & Ald. 401 ; *Malins v. Freeman*, 4 Bing. N. C. 395.

(*c*) See *Governors of Magdalen Hospital v. Knotts*, 5 Ch. D. 175.

(*d*) Petersdorff, *arg.* 11 M. & W. 261.

(*e*) *Baylis v. Dineley*, 3 M. & S. 477 ; Co. Lit. 172 *a*. The case is not accepted without question in America : Parsons on Contracts, 269 *n.* (1st ed.).

(*f*) 2 B. & C. 824.

tract to buy goods for the purposes of trade is absolutely void, ^{Purchase of goods in trade,} not voidable only : but all that had to be decided was that a ratification *after action brought* was no answer to the defence of infancy ; and the dicta, as pointed out by Mr. Benjamin, are inconsistent with a former case of higher authority (but which seems not to have been cited) where an infant was allowed to sue on a trading contract for the purchase of chattels, the only special circumstance being that he had already paid part of the price, so that it was clearly for his benefit that he should be able to enforce the contract : on this ground the decision was put in the Court of K.B. by Lord Ellenborough, but the broader opinion was expressed by Dampier, J., that the other party could in no case avoid the contract, and that the contracts of infants are as to their validity of two kinds only, those which are clearly for the infant's benefit and therefore bind him, and those which are not so and are voidable at his option. The Court of Exchequer Chamber affirmed the judgment without calling on counsel to support it, holding that "the general law is that the contract of an infant may be avoided or not at his own option," and that this case was no exception (a). In a much later case ^{Contract of service.} the following opinion was given by the Court of Queen's Bench on the conviction of a servant for unlawfully absenting himself from his master's employment :—

"Among many objections one appears to us clearly fatal. He was an infant at the time of entering into the agreement, which authorizes the master to stop his wages when the steam engine is stopped working for any cause. An agreement to serve for wages may be for the infant's benefit (b) ; but an agreement which compels him to serve at all times during the term but leaves the master free to stop his work and his wages whenever he chooses to do so cannot be considered as beneficial to the servant. It is inequitable and wholly void. The conviction must be quashed" (c).

But this decided only that the agreement was not enforceable against the infant. The Court cannot have meant to say that if the master had arbitrarily refused to pay wages for the work

(a) Benjamin on Sale, 23 ; *Warwick v. Bruce*, 2 M. & S. 205, in Ex. Ch. 6 Taunt. 118.

(b) It seems that *prima facie* it is so, even if it contains clauses imposing penalties, &c., in certain

events : *Wood v. Fenwick*, 10 M. & W. 195.

(c) *Reg. v. Lord*, 12 Q. B. 757, 17 L. J. M. C. 181, where the head note rightly says "void against the infant."

Leases.

actually done the infant could not have sued him on the agreement. Again, it is said that a lease made by an infant, without reservation of any rent (or even not reserving the best rent), is absolutely void. But this opinion is strongly disputed in Bacon's Abridgment, and also disapproved by Lord Mansfield, whose judgment Lord St. Leonards has adopted as good law, though the actual decision was not on this particular point in either case (*a*). And in a modern Irish case (*b*) it has been expressly decided that at all events a lease made by an infant reserving a substantial rent, whether the best rent or not, is not void but voidable; and further that it is not well avoided by the infant granting another lease of the same property to another person after attaining his full age. The Court inclined to think that some act of notoriety by the lessor would be required, such as entering, bringing ejectment, or demanding possession; however there was another reason, namely, that the second lease might be construed as only creating a future interest to take effect on the determination of the first. With regard to the first reason it seems to have been thought not immaterial that a freehold estate (for the life of the lessor or twenty-one years) had passed by the original lease. There is good English authority for the proposition that if a lease made by an infant is beneficial to him he cannot avoid it at all (*c*). It appears to be agreed that the sale, purchase (*d*), or exchange (*e*) of land by an infant is both as to the contract and as to the conveyance only voidable at his option.

Sale, &c.,
of land.Partner-
ship and
sharehold-
ing.

Again, there is no doubt that an infant may be a partner or shareholder (though in the latter case the company may refuse to accept him) (*f*); and though he cannot be made liable for partnership debts during his infancy, he is bound by the partnership accounts as between himself and his partners and cannot

(*a*) Bac. Ab. 4. 361; *Zouch v. Parsons*, 3 Burr. 1794 (where the decision was that the reconveyance of a mortgagee's infant heir, the mortgage being properly paid off, could not be avoided by his entry before full age): *Allen v. Allen*, 2 Dr. & W. 307, 340.

(*b*) *Slator v. Brady*, 14 Ir. C. L. 61.

(*c*) *Maddon v. White*, 2 T. R. 159.

(*d*) Co. Lit. 2 *b*, Bac. Ab. Infancy I. 3, (4, 360); Dart V. & P. (5th ed.) 25.

(*e*) Co. Lit. 51 *b*.

(*f*) But the company cannot dispute the validity of a transfer to an infant after the infant has transferred over to a person *sui juris*; *Gooch's ca.* 8 Ch. 266. And see Lindley, 2. 1389.

claim to share profits without contributing to losses. And if on coming of age he does not expressly disaffirm the partnership he is considered to affirm it, or at any rate to hold himself out as a partner, and is thereby liable for the debts of the firm contracted since his majority (a).

The liability of an infant shareholder who does not repudiate his shares to pay calls on them rests, as far as existing authorities go, on a somewhat different form of the same principle (of which afterwards). As to contribution in the winding up of a company, Mr. Justice Lindley (2. 1388) "is not aware of any case in which an infant has been put on the list of contributories. Upon principle, however, there does not appear to be any reason why he should not, if it be for his benefit; and this, if there are surplus assets, might be the case." Otherwise he cannot be deprived of his right to repudiate the shares, unless perhaps by fraud; but in any case if he "does not repudiate his shares, either while he is an infant or within a reasonable time after he attains twenty-one, he will be a contributory," and still more so if after that time he does anything showing an election to keep the shares. On the whole it is clear on the authorities (notwithstanding a few expressions to the contrary), that both the transfer of shares to an infant and the obligations incident to his holding the shares are not void but only voidable (b).

Marriage is on a different footing from ordinary contracts (c), Marriage. and it is hardly needful to say in this place that the possibility of a minor contracting a valid marriage has never been doubted in any of our Courts. Even if either or both of the parties be under the age of consent (fourteen for the man, twelve for the woman) the marriage is not absolutely void, but remains good if when they are both of the age of consent they agree to it (d). But the Marriage Act, 4 Geo. 4, c. 76 (ss. 8, 22), makes it very difficult, though not impossible, for a minor to contract a valid marriage without the consent of parents or guardians (e).

(a) Lindley, 1. 82-84; *Goode v. Harrison*, 5 B. & Ald. 147.

(b) *Lumsden's ca.* 4 Ch. 31; *Gooch's ca.* 8 Ch. 266: cp. p. 46, *infra*.

(c) Continental writers have wasted much ingenuity in debating with which class of contracts it should be

reckoned. Sav. Syst. § 141 (3. 317); Ortolan on Inst. 2. 10.

(d) Bacon Abr. 4. 336.

(e) In most continental countries the earliest age of legal marriage is fixed: in France it is 18 for the man, 15 for the woman, and consent of parents or lineal ancestors

Promises
to marry
and mar-
riage set-
tlements.

As to promises to marry and marriage settlements, it has long been familiar law that just as in the case of his other voidable contracts an infant may sue for a breach of promise of marriage, though not liable to be sued (*a*). An infant's marriage settlement is not binding on the infant unless made under the statute (see *post*, p. 52), and the Court of Chancery has no power to make it binding in the case of a ward (*b*). A settlement of a female infant's general personal property, the intended husband being of full age and a party, can indeed be enforced, but as the contract not of the wife but of the husband; the wife's personal property passing to him by the marriage he is bound to deal with it according to his contract (*c*). However, in any case the settlement is not void but only voidable; it may be confirmed by the subsequent conduct of the party when of full age and *sui*

Negotiable
instru-
ments.

Accounts
stated, and
opinion of
the Court
of Ex-
chequer on
the general
question.

juris (*d*). Again an infant's contract on a bill of exchange or promissory note was once supposed to be wholly void, but is now treated as only voidable (*e*). The same holds of an account stated; and here the decisive case is a strong authority in favour of the general contention that a contract is not in any case absolutely void by reason of the party's infancy. The Court said:—

“The argument on behalf of the defendant was that an account stated by an infant is not merely voidable but actually void, so that no subsequent ratification can make it of any avail. But we can see no sound or reasonable distinction in this respect between the liability of an infant on an account stated and his liability for goods sold and delivered *or on any other contract* . . . The general doctrine is that a party may after he attains the age of twenty-one years ratify and so make himself liable on contracts made during infancy. We think that on principle unopposed by authority this may be done on a contract arising on an account stated as well as on *any other contract*” (*f*).

is required up to the ages of 25 and 21 respectively. (Code Civ. 144, sqq.) But this consent may be dispensed with in various ways by matter subsequent or lapse of time: see art. 182, 183, 185. The marriage law of other states (except some where the canon law still prevails) appears to differ little on the average from the law of France on this matter of age.

(*a*) Bacon, Abr. Infancy and Age,

I. 4 (4. 370). Per Lord Ellenborough, *Warwick v. Bruce*, 2 M. & S. 205.

(*b*) *Field v. Moore*, 7 D. M. G. 691, 710.

(*c*) Davidson Conv. 3, pt. 2. 728.

(*d*) *Davies v. Davies*, 9 Eq. 468.

(*e*) Byles on Bills, 59 (10th ed.); undisputed in *Harris v. Wall*, 1 Ex. 122.

(*f*) *Williams v. Moor*, 11 M. & W. 256, 264, 266, 12 L. J. Ex. 253.

This may be claimed, we think, as a very strong modern judicial opinion, and so far as we know it remains uncontradicted by any equal authority of later date. Nor is the sanction of approved text-writers wanting for the same view. Mr. Leake takes no notice whatever of the current doctrine of the books; and a learned American writer says it has been declared in American Courts to be "unsatisfactory, liable to many exceptions, and difficult of safe application," and himself takes it for the better opinion that contracts made by infants are not in any case on that account absolutely void (*a*). It should be mentioned, however, that a more recent author adheres to the old division of them into three classes as binding, void, and voidable, and cites a late judgment in Maine where it is very clearly expressed (*b*). It seems, therefore, that there does not exist that *consensus* of American authority which on an unsettled question of pure common law might be of considerable value to us if it existed. We have seen however that in several important classes of cases (including some that were formerly supposed exceptional) an infant's contract is certainly not void: and we have also seen that there is not any clear authority for holding that in any case it is in fact void. And it is perhaps not necessary to seek or offer any further justification for refusing to admit an ill-defined and inconvenient class of exceptions, of which no positive instance can be found.

There is one exception to the rule that an infant may enforce his voidable contracts against the other party during his infancy, or rather there is one way in which he cannot enforce them. Specific performance is not allowed at the suit of an infant, because the remedy is not mutual, the infant not being bound (*c*).

An infant may avoid his voidable contracts (with practically few or no exceptions) either before or within a reasonable time

(*a*) Parsons on Contracts (1st ed.), 244, and see note *ib*. It appears that the misleading confusion of *void* and *voidable* occurs in American no less than in English reports: see p. 275, note.

(*b*) Hilliard on Contracts, 2, 129. The learned judge, however, allows only contracts for necessities to be

binding, which on the English authorities is certainly too narrow, and swells the class of void contracts by instances of acts that are not properly contracts at all. Mr. W. W. Story (On Contracts, § 101, sqq.) also adopts the threefold division.

(*c*) *Flight v. Bolland*, 4 Russ. 298.

Text-writers and American authorities. Conclusion: no reason for holding any contracts of infants void at C. L.

Infant cannot have specific performance.

At what time he may avoid

his contracts.

after coming of age : the rule is that “ matters *in fait* [*i.e.*, not of record] he shall avoid either within age or at full age,” but matters of record only within age (Co. Lit. 380 *b*) (*a*). However, where the nature of the case admits of it, an infant’s affirmation or repudiation of his contract while he is still a minor is treated as only provisional ; he cannot deprive himself of the right to elect at full age, and only then can his election be conclusively determined (*b*). There is no express authority for the saving words we have introduced into this proposition, but they are obviously required ; in the case of an infant shareholder, for instance, the unqualified application of it might make it impossible for anybody to deal with the shares until he came of age. Indeed there is no lack of authority to show that here as in other cases, so far as the interests of third persons are concerned, and to some extent also as regards acts done by the parties themselves on the faith of the contract, voidable means not invalid until ratified, but valid until rescinded (*c*). If an infant pays a sum of money under a contract, in consideration of which the contract is wholly or partly performed by the other party, he can acquire no right to recover the money back by rescinding the contract when he comes of age. Such is the case of a premium paid for a lease (*d*), or of the price of goods (not being necessities) sold and delivered to an infant and paid for by him : and so if an infant enters into a partnership and pays a premium, he cannot either before or after his full age recover it back, nor therefore prove for it in the bankruptcy of his partners (*e*).

Money paid under avoided contract, when not recoverable.

Infants’ Relief Act, 1874.

We must now consider the effect of the Act of 1874 (37 & 38 Vict. c. 62), which enacts as follows :—

1. All contracts whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or to

(*a*) See per Parke, B., *Newry & Enniskillen Ry. Co. v. Coombe*, 3 Ex. 565, 18 L. J. Ex. 325 ; per Cur. *L. & N. W. R. v. M’Michael*, 5 Ex. 114, 20 L. J. Ex. 97. As to an infant being bound when he comes of age by an acknowledgment made in a Court of Record, see Y. B. 20 & 21 Ed. 1, in the series of *Chronicles and Memorials* published under the direction of the Master of the

Rolls, p. 320.

(*b*) *L. & N. W. R. v. M’Michael*, *supra* ; *Slator v. Trimble*, 14 Ir. C. L. 342.

(*c*) Per Lord Colonsay, L. R. 2 H. L. 375.

(*d*) *Holmes v. Blogg*, 8 Taunt. 35, 508, S. C. Moore, 1. 466, 2. 552.

(*e*) *Ex parte Taylor*, 8 D. M. G. 254, 258.

be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void : provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute or by the rules of common law or equity enter, except such as now by law are voidable.

2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

3. This Act may be cited as The Infants' Relief Act, 1874.

The 2nd section supersedes the 5th section of Lord Tenterden's Act (9 Geo. 4, c. 14) (a), by which no ratification of a contract made during infancy could be sued upon unless in writing and signed by the party to be charged. The new enactment forbids an action to be brought at all on any such promise or ratification, and it applies to a ratification since the Act of a promise made in infancy before the passing of the Act (b). It probably also prevents the ratification from being available by way of set-off (c). This, however, is a different thing from depriving the ratification of all effect. For it may have other effects than giving a right of action or set-off, and these are not touched. While the matter was governed by Lord Tenterden's Act there were many cases where a contract made during infancy might be adopted or confirmed without any ratification in writing so as to produce important results. Thus in the case of a marriage settlement the married persons are bound not so much by liability to be sued (though in some cases and for some purposes the husband's covenants are of importance) as by inability to interfere with the disposition of the property once made and the execution of the trusts once constituted : and so far as concerns this an infant's marriage settlement may, as we have seen, be sufficiently confirmed by his or her conduct after full age (d). Again an infant partner who does not avoid the partnership at his full age is, as between himself and his partners, completely bound by the terms on which he entered

Ratification still operative for some purposes.

(a) Since expressly repealed by the Statute Law Revision Act, 1875, 38 & 39 Vict. c. 66.

(b) *Ex parte Kibble*, 10 Ch. 373.

(c) *Rawley v. Rawley* (C. A.) 1 Q. B. D. 460.

(d) *Darics v. Darics*, 9 Eq. 468, *supra* p. 40.

it without any formal ratification ; and a Court of Equity taking the partnership accounts would, it is apprehended, apply the same rule to the time of his minority as to the time after his full age. Indeed there would be no other rule to apply. Again an infant shareholder who does not disclaim may after his full age, at any rate, be made liable for calls without any express ratification ; on the contrary, the burden of proof is on him to show that he repudiated the shares within a reasonable time (a).

And as Lord Tenterden's Act did not formerly stand in the way of these consequences of the affirmation or non-repudiation of an infant's contract, so the Act of 1874 will not stand in the way of the same or like consequences in the future. In fact the operation of the present Act seems to be to reduce all voidable contracts of infants ratified at full age, whether the ratification be formal or not, to the position of agreements of imperfect obligation, that is, which cannot be directly enforced but are valid for all other purposes. Other examples of such agreements and of their legal effect will be found in the chapter specially assigned to that subject.

Semble, no specific performance for either party of any contract made during infancy.

Effect of proviso as to new consideration.

Of s. 1, making certain contracts void.

A collateral result of this enactment will be that one who has made a contract during his infancy will not now be able to obtain specific performance of it after his full age, for the same reason that he cannot and formerly could not do so sooner (b).

The proviso about new consideration was presumably introduced by way of abundant caution, to prevent colourable evasions of the Act by the pretence of a new contract founded on a nominal or trifling new consideration. Where a substantial consideration appears on the face of the transaction these words can hardly be supposed to impose on the Court the duty of inquiring whether the apparent consideration is the whole of the real consideration. In the first section the words concerning the purchase of goods are not free from obscurity. If we might construe the Act as if it said "for *payment for* goods supplied," &c., it would be clear enough : but it is not so clear what is the

(a) See pp. 39, 46.

(b) *Flight v. Bolland*, 4 Russ. 298,

p. 41, *supra*.

precise operation of an enactment that contracts "for goods supplied or to be supplied," other than necessities, shall be void. It seems to follow that no property will pass to the infant by the attempted contract of sale, and that if he pays the price or any part of it before delivery of the goods he may recover it back; as indeed he might have done before the Act, for the contract was voidable, and he was free to rescind it while it was yet executory. But does it also follow that if the goods are delivered no property passes, and that if they are paid for the money may be recovered back? Such a consequence would be most unreasonable, and is not required by the policy of the statute, which is obviously to protect infants from running into debt, and to discourage tradesmen and others from giving credit to them, not to deprive them of all discretion in making purchases for ready money. It is certain that when a particular class of contracts is simply declared to be unlawful, this does not prevent property from passing by an act competent of itself to pass it, though done in pursuance or execution of the forbidden contract (a). In this case also it seems clear that the delivery with intention to pass the property would pass it apart from any question of contract, and such authorities as *Holmes v. Blogg* (b) and *Ex parte Taylor* (c), where the contract was only voidable but was afterwards rescinded, would still be applicable, so that if the goods had been accepted the money could not be recovered.

(On this more reasonable construction, however, it is difficult to see what result is obtained by the first section which is not equally well or better obtained by the second. At common law the infant was not bound by any of the contracts specified in the first section, unless he chose to bind himself at full age: by the second section he cannot henceforth so bind himself. No more complete protection can be imagined, and the first section appears superfluous. Perhaps we may suppose that the first section was meant to provide a popular exposition of the chief practical effects of the following one.

It is conceived that a bond, bill of exchange, or note given by a man of full age, for which the consideration was in fact a loan of money or the supply of goods not necessities during

Qu. Was this necessary?

(a) *Ayers v. South Australian Banking Co.*, L. R. 3 P. C. 548, 559.

(b) 8 Taunt. 508.

(c) 8 D. M. G. 254, p. 42, *supra*.

his infancy, would not be void under s. 1 (*a*). But s. 2 would no doubt effectually prevent it from being enforced, though perhaps the words are not the most apt for that purpose.

Liability
on obliga-
tions inci-
dent to
property,
and espe-
cially as to
railway
shares.

2. Of the liability of infants on obligations incident to interests in permanent property.

In an old case reported under various names in various books (*b*), of which a sufficient account is given in the judgment of the Court of Exchequer in *L. & N. W. Ry. Co. v. M'Michael* (*c*) it was decided that an infant lessee who continues to occupy till he comes of full age is after his full age liable for arrears of rent incurred during his infancy. In like manner a copyholder who was admitted during his minority and has not disclaimed is bound to pay the fine (*d*). In recent times an important application of this principle has been made in the case of infant shareholders in railway companies. An infant is not incapable of being a shareholder, and as such he is *prima facie* liable when he comes of age to be sued for calls on his shares, and he can avoid the liability only by showing that he repudiated the shares either before attaining his full age (*e*), or in a reasonable time afterwards (*f*). In the first of the series of cases on this head some of the judges seem to have thought that even an infant shareholder was made absolutely liable by the general form of the enactment in the Companies Clauses Consolidation Act defining the liability of shareholders (*g*). This view however has since been declared erroneous and inconsistent with the established rule that general words in statutes are not to be construed so as to deprive infants, lunatics, &c., of the protection given to them by the common law. In this case the liability, though statutory, is still in the nature of contract, and is subject to the ordinary rules as to the competency of contracting parties. The true principle is that a railway shareholder is not a mere contractor, but a purchaser of an interest in a subject of a permanent nature with certain obli-

(*a*) Cp. *Flight v. Reed*, 1 H. & C. 703, 32 L. J. Ex. 265.

(*b*) *Kettle v. Eliot, &c.* Rolle, Ab. 1. 731, K.; Cro. Jac. 320; Brownlow 120; 2 Bulst. 69.

(*c*) 5 Ex. 114, 20 L. J. Ex. 97.

(*d*) *Evelyn v. Chichester*, 3 Burr. 1717.

(*e*) *Neuery & Enniskillen Ry. Co.*

v. Coombe, 3 Ex. 565, 18 L. J. Ex. 325.

(*f*) A plea which merely alleged repudiation after full age was therefore held bad in *Dublin & Wicklow Ry. Co. v. Black*, 8 Ex. 181.

(*g*) Lord Denman, C. J., and Patteson, J., in *Cork & Bandon Ry. Co. v. Cazenove*, 10 Q. B. 935.

gations attached to it ; and those obligations he is bound to discharge, though they arose while he was a minor, unless he has renounced the interest. A mere absence of ratification is no sufficient defence, even if coupled with the allegation that the defendant has derived no profit from the shares. For if the property is unprofitable or burdensome, it is the holder's business to disclaim it on attaining his full age, if not before : and it is by no means clear that he could exonerate himself even during his minority by showing that the interest was not at the time beneficial, unless he actually disclaimed it. It is submitted that in such a case the disclaimer if made would conclusively determine his interest and not merely suspend it. Comparing the analogous case of a lease, the Court said—" We think the more reasonable view of the case is that the infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession, and if he has not disclaimed, at all events unless he still be a minor " (a). In all the decided cases the party appears to have been of full age at the time of the action being brought, but there is nothing to show that (except possibly in the case of a disadvantageous contract) he might not as well be sued during his minority.

It may perhaps be doubted whether the reason on which these authorities are grounded would apply to the case of shares in a company not having any permanent property ; but it seems tolerably plain that if necessary the general principles of the law of partnership would, and that the same results would follow, except it may be as to suing the shareholder while still a minor.

3. Of the liability of an infant when the contract is for his benefit, and especially for necessities.

Liability
on benefi-
cial con-
tract. *Qv.*
Extent of
the rule ?

It has been laid down in general terms that if an agreement be for the benefit of an infant at the time, it shall bind him (b). We are not aware, however, that this rule has been applied in practice, except in the case of obligations coupled with interests in property (where it is not clear, as above said, that the question of benefit is material), and except so far as an infant's liability for necessities is founded on this reason. In one recent

(a) *L. & N. W. Ry. Co. v. M' Michael*,
5 Ex. 114, 20 L. J. Ex. 97, 101.

(b) *Bacon Ab. Infancy*, I. 3, 4. 360;
Maddon v. White, 2 T. R. 159.

case the rule was expressed more widely in the converse form, that the contract is binding unless manifestly to the infant's prejudice (*a*). But this, it is submitted, goes too far. The contract before the Court was that of an apprentice with a master; and this and other cases (*b*) certainly show that such a contract, or an ordinary contract to work for wages, will, if it be reasonable, be considered binding on the infant to this extent, that he may no less than an adult incur the statutory penalties for unlawfully absenting himself from his master's employment. But it is distinctly laid down that an apprentice under age cannot be sued on the covenants made by him in the indenture of apprenticeship except by the custom of London (*c*). Again there are many conceivable cases in which it might be for an infant's benefit, or at least not manifestly to his prejudice, to enter into trading contracts, or to buy goods other than necessities: one can hardly say for example that it would be manifestly to the disadvantage of a minor of years of discretion to buy goods on credit for re-sale in a rising market; yet there is no doubt whatever that such a contract would at common law be voidable at his option. Nor has it ever been suggested that an infant partner or shareholder is at liberty to disclaim at full age only in case the adventure has been unprofitable or is obviously likely to become so. However, inasmuch as since the Infants' Relief Act, 1874, an infant's contract, if not valid and binding on him from the first, can never be enforced against him at all, it seems quite possible that the Courts may in future be disposed to extend rather than to narrow the description of contracts which are considered binding because for the infant's benefit.

Liability
for neces-
saries.

3*a*. We pass now to the special question of contracts for necessities.

The most recent and important authority on this subject is the judgment of the Exchequer Chamber in *Ryder v. Wombwell* (*d*) from which the following introductory statement is taken:—

“The general rule of law is clearly established, and is that an infant is generally incapable of binding himself by a contract. To

(*a*) *Cooper v. Simmons*, 7 H. & N. 707, 721, per Wilde, B. Not so strongly put in the L. J. report, 31 L. J. M. C. 138, 144.

(*b*) *Wood v. Fenwick*, 10 M. & W. 195.

(*c*) Bacon Ab. Infancy A. 4. 340.

(*d*) L. R. 4 Ex. 82, 88; in the Court below L. R. 3 Ex. 90. On the subject generally cp. Benjamin on Sale, 18–22.

this rule there is an exception introduced, not for the benefit of the tradesman who may trust the infant, but for that of the infant himself. This exception is that he may make a contract for necessities. And as is accurately stated by Parke, B., in *Peters v. Fleming* (a) 'From the earliest time down to the present the word necessities is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, degree, and station in life in which he is ; and therefore we must not take the word necessities in its unqualified sense, but with the qualification above pointed out.' "

What in any particular case may fairly be called necessary in this extended sense, is what is called a question of mixed fact and law. The provinces of the Court and the jury respectively, as defined by the Exchequer Chamber, seem to be as we now proceed to state.

What are necessities ; a question of mixed fact and law.

The station and circumstances of the defendant and the particulars of the claim being first ascertained, it is then for the Court to say whether the things supplied are *prima facie* necessities, i.e., are such as a jury may reasonably find to be necessities for a person in the defendant's circumstances, or "whether the case is such as to cast on the plaintiff the onus of proving that the articles are within the exception [i.e., are necessities], and then whether there is any sufficient evidence to satisfy that onus," to show, that is, that although the articles would generally not be necessary for a person in the defendant's position, yet there exist in the case before the Court special circumstances such as to make them necessary. Thus articles of diet which are *prima facie* mere luxuries may become necessities if prescribed by medical advice (b). It is said that in general the test of necessity is usefulness, and that nothing can be a necessary which cannot possibly be useful. It is obvious, however, that it is in truth a question of common sense and experience what is or is not reasonably required by a person in a given station and circumstances, and one on which not much light can be thrown by the statement in a general form of rules founded on extreme cases. It is to be borne in mind (as was remarked in the Exchequer Chamber) that the question is not whether the things are such that a person of the defendant's means may reasonably

The Court says if things are *prima facie* necessary.

(a) 6 M. & W. at p. 46.

B. 606, 13 L. J. Q. B. 130.

(b) See *Wharton v. Mackenzie*, 5 Q.

buy and pay for them, but whether they can be reasonably said to be so necessary for him that, though an infant, he must obtain them on credit rather than go without. For the purpose of deciding this question the Court will take judicial notice of the ordinary customs and usages of society (*a*).

The jury says if they are in fact necessary.

If on these preliminary considerations the Court decides that there is evidence on which the supplies in question may reasonably be treated as necessities, then it is for the jury to say whether they were in fact necessities for the defendant under all the circumstances of the case (*b*).

Supply from other sources, how far material.

As a matter of common sense it seems very relevant to this question whether the defendant was or was not already sufficiently provided with commodities of the particular description (especially when we bear in mind that this exceptional liability for necessities is admitted in the interest not of the seller but of the infant buyer) : but it seems still an open question whether evidence that he was so provided is admissible, at any rate without showing that the plaintiff knew it or had reason to presume it. (L. R. 4 Ex. at pp. 36, 42.) The case most directly in point (*c*) seems to lay down in effect that the question whether goods supplied are necessities is a question of fact, depending (among other conditions) on the extent to which the party is already supplied with similar goods ; that if they are necessary the tradesman will not be the less entitled to recover because he made no inquiries as to the infant's existing supplies ; but that on the other hand, if the infant is already so well supplied that these goods are in truth not necessary, the tradesman's ignorance of that fact will not make them necessary, and he cannot recover ; that, indeed, there is no rule of law casting on him a positive duty to make inquiries, but that he omits to do so at his peril.

It seems, however, that the defendant having an income out of which he might keep himself supplied with necessities for ready money is not equivalent to his being actually supplied,

(*a*) L. R. 4 Ex. at p. 40.

(*b*) It would seem from *Ryder v. Wombwell* (*supra*) that the power of the Court to control or review the

finding of the jury is neither more nor less in this than in any other class of cases.

(*c*) *Brayshaw v. Eaton*, 7 Scott 183.

and does not prevent him from contracting for necessities on credit (a).

It would be probably natural for juries, if not warned against it, to fall into a way of testing the necessary character of supplies, not so much by what the means and position of the buyer actually were, as by what they appeared to be to the seller, and such a view is not altogether without countenance from authority (b). It is conceived, however, that this is quite erroneous, and that in truth the knowledge or belief of the tradesman, as to the infant's circumstances and income certainly, and as to the extent to which he is furnished with goods of the same kind probably, has nothing to do with the question whether the goods are necessary or not. It may be said that the question for the Court will, as a rule, be whether articles of the general class or description were *prima facie* necessities for the defendant, and the question for the jury will be whether, being of a general class or description allowed by the Court as necessary, the particular items were of a kind and quality necessary for the defendant, having regard to his station and circumstances. For instance, it would be for the Court to say whether it was proper for the defendant to buy a watch on credit, and for the jury to say whether the particular watch was such a one as he could reasonably afford. But this will not hold in extreme cases. In *Ryder v. Wombwell* the Court of Exchequer Chamber held, reversing the judgment of the majority below on this point, that because a young man must fasten his wristbands somehow it does not follow that a jury are at liberty to find a pair of jewelled solitaires at the price of 25*l.* to be necessities even for a young man of good fortune. There is a point of costliness and luxury—not of course to be verbally defined—beyond which an article, though belonging to a useful and even necessary class, and capable of real use, cannot be called necessary.

(a) *Burghart v. Hall*, 4 M. & W. 727. *Contra Mortara v. Hall*, 6 Sim. 495. The doctrine there laid down seems superfluous, for the supplies there claimed for (such as 209 pair of gloves in half a year)

could not have been reasonably found necessary in any case.

(b) In *Dalton v. Gib*, 7 Scott 117, much weight is given to the *apparent* rank and circumstances of the party.

Results.

The general result appears to stand thus :—

When it is sought to enforce a contract against an infant on the ground that it was for necessities, then the *prima facie* necessity of the commodities supplied is a question for the Court.

If the Court holds them not *prima facie* necessary, evidence may be given of special circumstances rendering them in fact necessary, and the sufficiency or otherwise of such evidence is a question for the Court.

Subject as above, the necessity of the commodities in fact is a question for the jury.

Commodities of a description in itself necessary are [probably] not necessities when the buyer is already supplied with as much of the like commodities as he can reasonably want.

**What the
term “ne-
cessaries”
includes.**

Hitherto we have spoken of a tradesman supplying goods, this being by far the most common case. But the range of possible contracts for “necessaries” is a much wider one. “It is clearly agreed by all the books that speak of this matter that an infant may bind himself to pay for his necessary meat, drink, apparel, physic [including, of course, fees for medical attendance, &c., as well as the mere price of medicines], and such other necessities; and likewise for his good teaching and instruction, whereby he may profit himself afterwards” (a). Thus learning a trade may be a necessary, and on that principle an infant’s indenture of apprenticeship has been said to be binding on him (b). The preparation of a settlement containing proper provisions for her benefit has been held a necessary for which a minor about to be married may make a valid contract, apart from any question as to the validity of the settlement itself (c).

A more remarkable extension of the definition of necessities is to be found in the case of *Chapple v. Cooper* (d), where an infant widow was sued for her husband’s funeral expenses. The Court held that decent burial may be considered a necessary

(a) *Bac. Abr. Infancy and Age*, I. (4. 335). And see *Chapple v. Cooper*, 13 M. & W. 252, 13 L. J. Ex. 286.

(b) *Cooper v. Simmons*, 7 H. & N. 707, 31 L. J. M. C. 138, per Martin, B. See, however, p. 48, *supra*.

(c) *Helps v. Clayton*, 17 C. B. N. S. 553, 34 L. J. C. P. 1, see the pleadings, and the judgment of the Court *ad fin.*

(d) 13 M. & W. 252, 13 L. J. Ex. 286.

for every man, and husband and wife being in law the same person, the decent burial of a deceased husband is therefore a necessary for his widow. The conclusion, though arrived at by a circuitous and highly artificial course of reasoning, seems in itself satisfactory on a broader ground, which however the Court did not adopt. A contract entered into for the purpose of performing an imperative moral and social, if not legal, duty which it would have been scandalous to omit, may well be considered of as necessary a character as any contract for personal service or purchase of goods for personal use.

We refrain from any further enumeration of the various things which have been decided to be necessary or not necessary, for two reasons : that the question, though to a great extent a question for the Court, is one of judicial common sense in each particular case, for which precedents can supply no absolute authority but only more or less instructive analogies, and that to undertake such an enumeration would be to usurp the office of a Digest (*a*).

The supply of necessaries to an infant creates only a liability on simple contract, and it cannot be made the ground of any different kind of liability (*b*). Coke says, "If he bind himself in an obligation or other writing with a penalty for the payment of any of these, that obligation shall not bind him" (*c*). *A fortiori*, a deed given by an infant to secure the repayment of money advanced to buy necessaries is voidable (*d*). Such is also the common law with regard to negotiable instruments (*e*). But it is said that a bill or note given by an infant to a creditor for necessaries may be valid if it is not payable to order or negotiable (*f*).

The liability is on simple contract only.

There are some particular contracts of infants valid by custom. By custom incident to the tenure of gavelkind an infant may sell his land of that tenure at the age of fifteen, but the conveyance

What contracts an infant can make by custom.

(*a*) See the cases collected, Fisher's Dig. 4632-5.

(*b*) At common law a loan of money could not be deemed equivalent to necessaries, though actually spent on necessaries : Bac. Abr. 4. 356.

(*c*) Co. Lit. 172 *a*, cp. 4 T. R. 368.

(*d*) *Martin v. Gale*, 4 Ch. D. 428.

(*e*) Leake, 234 ; and so of accounts stated, but these are now absolutely void, as well as loans of money to infants. *Supra*, p. 42.

(*f*) Anon. MS. Fisher's Dig. 4626. Cp. Rolle Ab. 1. 729, pl. 7.

must be by feoffment, and is subject to other restrictions (a). This, however, is not a full capacity of contracting, for there is no reason to suppose that an action could be brought against the infant for a breach of the contract for sale, or specific performance of it enforced.

“Also by the custom of London an infant unmarried and above the age of fourteen, though under twenty-one, may bind himself apprentice to a freeman of London by indenture with proper covenants; which covenants by the custom of London shall be as binding as if he were of full age,” and may be sued upon in the superior courts as well as in the city courts (b).

Bystatute. Infants, or their guardians in their names, are empowered by statute (11 Geo. 4 & 1 Wm. 4, c. 65, ss. 16, 17) to grant renewals of leases, and make leases under the direction of the Court of Chancery, and in like manner to surrender leases and accept new leases (s. 12). (The provisions as to renewals of leases extend also to married women) (c). And by a later Act (18 & 19 Vict. c. 43), infants may with the sanction of the Court make valid marriage settlements of both real and personal property (d).

Infant not liable for wrong where the claim is in substance *ex contractu*. 4. *Of an infant's immunity as to wrongs connected with contract.*

An infant is generally no less liable than an adult for wrongs committed by him, subject only to his being in fact of such age and discretion that he can have a wrongful intention, where such intention is material; but he cannot be sued for a wrong, when the cause of action is in substance *ex contractu*, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract—which, as in the analogous case of married women (e), the law does not allow. Thus it was long ago held that an infant innkeeper could not be made liable in an action on the case for the loss of his guest's goods (f). There is another old case reported in divers books (g)

(a) Bacon Ab. Gavelkind, A., 4. 49; Dav. Conv. 2. pt. 1. 221 (3d ed.); Dart. V. & P. *ad init.*

(b) Bacon Ab. Infancy, B., 4. 340.

(c) See Dan. Ch. Pr. 2. 1917; *Re Clark*, 1 Ch. 292; *Re Letchford*, 2 Ch. D. 719.

(d) See the Act and notes in

Morgan, Ch. Acts and Orders, and Dan. Ch. Pr. 2. 1211.

(e) See p. 58. *infra*.

(f) Rolle Ab. 1. 2, Action sur Case, D. 3.

(g) *Johnson v. Pie*, Sid. 258, 1 Lev. 169, 1 Keb. 913.

(the clearest of the reports is transcribed with immaterial omissions in a judgment of Knight Bruce, V.-C.) (a), where it was decided that an action of deceit will not lie upon an assertion by a minor that he is of full age. It was said that if such actions were allowed all the infants in England would be ruined, for though not bound by their contracts, they would be made liable as for tort; and it appears in Keble's report that an infant had already been held not liable for representing a false jewel not belonging to him as a diamond and his own. The rule is decidedly laid down in *Jennings v. Runnall* (b), where it was sought to recover damages from an infant for overriding a hired mare. But if an infant's wrongful act, though concerned with the subject-matter of a contract, and such that but for the contract there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, or being an act expressly forbidden by it, then the infant is liable. The distinction is established and well marked by a modern case in the Common Pleas, where an infant had hired a horse for riding, but not for jumping, the plaintiff refusing to let it for that purpose; the defendant allowed his companion to use the horse for jumping, whereby it was injured and ultimately died. It was held that using the horse in this manner, being a manner positively forbidden by the contract, was a mere trespass and independent tort, for which the defendant was therefore liable (c).

But liable for wrong apart from contract, though touching the subject-matter of a contract.

It is doubtful whether an infant can be made liable *quasi ex contractu* (as for money received), when the real cause of action is a wrong independent of contract; but since the Judicature Acts have abolished the old forms of action, the question seems of little importance (d).

Qu. Liable on contract implied in law?

(a) *Stikeman v. Dawson*, 1 De G. & Sm. 113; and see other cases collected at p. 110, where "the case mentioned in Keble" is that which, as stated in the text, occurs in his report of *Johnson v. Pie*.

(b) 8 T. R. 335. It is also recognized in *Price v. Hewett*, 8 Ex. 146 (not a decision on the point).

(c) *Burnard v. Haggis*, 14 C. B. N. S. 45, 32 L. J. C. P. 189.

(d) The liability is affirmed in

Chitty on Contracts (p. 148, 9th ed.), and by Mr. Leake (p. 226), and disputed by Mr. Dicey (on Parties, 284), who is supported by a dictum of Willes, J., assuming that infancy would be a good plea to an action for money received, though substantially founded on a wrong. *Alton v. Midland Ry. Co.* 19 C. B. N. S. at p. 241; 34 L. J. C. P. at p. 297.

In equity liable and bound by his acts, &c., if he represent himself as of full age; but only to the extent of any advantage thereby gained.

5. *Liability in equity on representation of full age.*

When an infant has induced persons to deal with him by falsely representing himself as of full age, he incurs an obligation in equity, which however in the case of a contract is not an obligation to perform the contract, and must be carefully distinguished from it (a). Indeed it is not a contractual obligation at all. It is limited to the extent we have stated above (p. 35), and the principle on which it is founded is often expressed in the form: "An infant shall not take advantage of his own fraud." A review of the principal cases will clearly show the correct doctrine. In *Clarke v. Cobley* (b) the defendant being a minor had given his bond to the plaintiff for the amount of two promissory notes made by the defendant's wife before the marriage, which notes the plaintiff delivered up. (It must be taken, though it is not clear by the report, that the defendant falsely represented himself as of full age.) The plaintiff on discovering the truth, and after the defendant came of age, filed his bill praying that the defendant might either execute a new bond, pay the money, or deliver back the notes. The Court ordered the defendant to give back the notes, and that he should not plead to any action brought on them the Statute of Limitation or any other plea which he could not have pleaded when the bond was given; but refused to decree payment of the money, holding that it could do no more than take care that the parties were restored to the same situation in which they were at the date of the bond. *Cory v. Gertcken* (c) shows that when an infant by falsely representing himself to be of full age has induced trustees to pay over a fund to him, neither he nor his representatives can afterwards charge the trustees with a breach of trust and make them pay again. *Overton v. Banister* (d) confirms this: it was there held however that the release of an infant *cestui que trust* in such a case is binding on him only to the extent of the sum actually received by him. The later case of *Wright v. Snowe* (e) seems not to agree with this, though *Overton v. Banister* was cited, and

(a) *Acc. Bartlett v. Wells*, 1 B. & S. 836, 31 L. J. Q. B. 57. Declaration for goods sold, &c. Plea, infancy. Equitable replication, that the contract was induced by defendant's fraudulent representation that he was of age. The replication was held bad, as not meeting the defence,

but only showing a distinct equitable right collateral to the cause of action sued upon.

(b) 2 Cox 173.

(c) 2 Madd. 40.

(d) 3 Ha. 503.

(e) 2 De G. & Sm. 321.

apparently no dissent expressed. There a legatee had given a release to the executrix, representing himself to her solicitor as of full age ; afterwards he sued for an account, alleging that he was an infant at the date of the release. The infancy was not sufficiently proved, and the Court would not direct an inquiry, considering that in any event the release could not be disturbed. This appears to go the length of holding the doctrine of estoppel applicable to the class of representations in question, and if that be the effect of the decision its correctness may perhaps be doubted. In *Stikeman v. Dawson* (a) the subject of infants' liability for wrongs in general is discussed in an interesting judgment by Knight Bruce, V.-C., and the important point is decided that in order to establish this equitable liability it must be shown that the infant actually represented himself to be of full age ; it is not enough that the other party did not know of his minority. And as there must be an actual false representation, so it has been more lately held that no claim for restitution can be sustained unless the representation actually misled the person to whom it was made. No relief can be given if the party was not in fact deceived, but knew the truth at the time ; and it makes no difference where the business was actually conducted by a solicitor or agent who did not know (b).

There must be a positive representation, not mere dissimulation : and the other party must be in fact misled.

If a minor has held himself out as an adult, and so traded and been made bankrupt, he cannot have the bankruptcy annulled on the ground of his infancy (c), nor can he oppose the adjudication on that ground (d). And it has been decided with some reluctance by the Court of Appeal that a loan obtained by a minor on the faith of his representation that he is of full age is a debt provable in bankruptcy (e). This is not inconsistent with the principle that the obligation is not *ex contractu* ; for under the existing law at any rate there is no rule to confine proof in bankruptcy to claims arising out of contract (f).

Proof in Bankruptcy.

A transaction of this kind cannot stand in the way of a subsequent valid contract with another person made by the

But subsequent valid contract

(a) 2 De G. & Sm. 90.

(b) *Nelson v. Stocker*, 4 De G. & J. 458.

(c) *Ex parte Watson*, 16 Ves. 265, *Ex parte Bates*, 2 Mont. D. & D. 337.

(d) *Ex parte Lynch*, 2 Ch. D. 227.

The Infants' Relief Act, 1874, does not affect this class of cases : *ib.*

(e) *Ex parte Unity Bank*, 3 De G. & J. 63.

(f) Bankruptcy Act, 1869, s. 31, *Ex parte Peacock*, 6 Ch. 682.

after full
age pre-
vails.

infant after he has come of age ; and the person who first dealt with him on the strength of his representing himself as of age acquires no right to interfere with the performance of such subsequent contract (*a*). This is another proof that the infant's false representation gives no additional force to the transaction *as a contract*.

It was also held in the case referred to that, assuming the first agreement to have been only voidable, it was clearly avoided by the act of the party in making another contract inconsistent with it after attaining his full age. But it has been decided in Ireland (as we have seen) that this is not so in the case of a lease granted by an infant ; the making of another lease of the same property to another lessee after the lessor has attained full age is not enough to avoid the first lease (*b*). The fact that an interest in property and a right of possession had passed by the first lease, though voidable, seems a sufficient ground for the distinction.

Married
women
generally
cannot
contract.

II. MARRIED WOMEN.

A married woman is incapable of binding herself by a contract (*c*).

If she attempts to do so "it is altogether void, and no action will lie against her husband or herself for the breach of it" (*d*). And the same consequence follows as in the case of infants, *viz.*, that although a married woman is answerable for wrongs committed by her during the coverture, including frauds, and may be sued for them jointly with her husband, or separately if she survives him, yet she cannot be sued for a fraud where it is directly connected with a contract with her, and is the means of effecting it and parcel of the same transaction, *e.g.*, where the wife has obtained advances from the plaintiff for a third party by means of her guaranty, falsely representing herself as sole (*d*) ; but it is doubtful whether this extends to all cases of false representation by which credit is obtained (*e*). For the same reason—that the law will not allow the contract to be indirectly enforced—a

(*a*) *Inman v. Inman*, 15 Eq. 260.

(*b*) *Slater v. Brady*, 14 Ir. C. L. 61, *supra*, p. 38.

(*c*) Cp. Benjamin on Sale, 27-31.

(*d*) Per Cur. *Fairhurst v. Liver-*

pool Adelphi Loan Association, 9 Ex. 422, 429 ; 23 L. J. Ex. 164.

(*e*) *Wright v. Leonard*, 11 C. B. N. S. 258, 30 L. J. C. P. 365, where the Court was divided.

married woman is not estopped from pleading coverture by having described herself as *sui juris* (a).

The fact that a married woman is living and trading apart from her husband does not enable her at common law to contract so as to give a right of action against herself alone (b). Nor does it make any difference if she is living separate from her husband under an express agreement for separation, as no agreement between husband and wife can change their legal capacities and characters (c).

But "a married woman, though incapable of making a contract, is capable of having a chose in action conferred upon her, which will survive to her on the death of the husband, unless he shall have interfered by doing some act to reduce it into possession": thus she may buy railway stock, and become entitled to sue for dividends jointly with her husband (d). When a third person assents to hold a sum of money at the wife's disposal, but does not pay it over, this is conferring on her a chose in action within the meaning of the rule (e).

But may acquire contractual rights: for her husband's benefit if he exercises them during the coverture; otherwise for her own if she survive.

During the joint lives of the husband and wife the husband is entitled *jure mariti* to receive any sum thus due; "but if the wife dies before the husband has received it, the husband, although his beneficial right remains the same, must in order to receive the money take out administration to his wife; and if he dies without having done so, it is necessary that letters of administration should be taken out to the wife's estate (for such is still the legal character of the money), but the wife's administrator is only a trustee for the representative of the husband" (f). Accordingly the Court of Probate cannot dispense with the double administration, even where the same person is the proper representative of both husband and wife, and is also beneficially entitled (g).

(a) *Cannam v. Farmer*, 3 Ex. 698.

(b) *Clayton v. Adams*, 6 T. R. 605.

(c) *Marshall v. Rutton*, 8 T. R. 545; see Lord Brougham's remarks, 3 M. & K. 221.

(d) Per Cur. *Dalton v. Midland Ry. Co.* 13 C. B. 474, 22 L. J. C. P. 177. And see 1 Wms. Saund. 222, 223. On the question what amounts to reduction into possession, see

Williams on Executors, l. 801 (6th ed.), 856 (7th ed.), *Widjery v. Tupper*, 5 Ch. D. 516.

(e) *Fleet v. Perrins*, L. R. 3 Q. B. 536, 4 Q. B. 500.

(f) Per Lord Westbury, *Partington v. Atty.-Gen.* L. R. 4 H. L. 100, 119.

(g) *In the Goods of Harding*, L. R. 2 P. & D. 394.

Cannot
during
coverture
renew debt
barred by
Stat. of
Limita-
tion.

Inasmuch as according to the view established by modern decisions a promise to pay a debt barred by the Statute of Limitation operates not by way of post-dating the original contract so as to "draw down the promise" then made, but as a new contract founded on the subsisting consideration (see the chapter on Agreements of Imperfect Obligation, *infra*), a married woman's general incapacity to contract prevents such a promise, if made by her, from being effectual; and where before the marriage she became a joint debtor with another person, that person's acknowledgment after the marriage is also ineffectual, since to bind one's joint debtor an acknowledgment must be such as would have bound him if made by himself (*a*).

The rules of law concerning a wife's power to bind her husband by contract depend partly on the general principles of agency, partly on a peculiar authority implied in the relation of husband and wife. They do not, however, fall within the province of this work (*b*).

Excep-
tions:
Queen
Consort.

Exceptions.—The wife of the King of England may by the common law sue and be sued as a *feme sole* (Co. Litt. 133 *a*).

Wife of
person
civilly
dead.

The wife of a person civilly dead may sue and be sued alone (*Ib.* 132 *b*, 133 *a*). The cases dwelt on by Coke are such as practically cannot occur at this day, and it seems that the only persons who can now be regarded as civilly dead are persons outlawed or convicted of felony, and not lawfully at large under any licence (*c*). An alien enemy, though disabled from suing, is not civilly dead, and his wife cannot sue alone on a contract made with her either before or during coverture; so that while he is an alien enemy neither of them can maintain an action on the contract. The remedy may thus be irrecoverably lost by the operation of the Statute of Limitation, but this inconvenience does

(*a*) *Pittam v. Foster*, 1 B. & C. 248; 1 Wms. Saund. 172.

(*b*) On this see notes to *Manby v. Scott*, 2 Sm. L. C. 479 sqq.; Chitty on Contracts (9th ed.) 159, sqq.

(*c*) Transportation was considered as an abjuration of the realm, which could be determined only by an actual return after the sentence had expired: *Carrol v. Blencow*, 4

Esp. 27. The analogy to Coke's 'Civil Death' is discussed, *arg.* in *Ex parte Franks*, 7 Bing. 762. At common law convicted felons and outlaws cannot sue, but remain liable to be sued on contracts made by them during outlawry or conviction: Chitty, Cont. 182. Dicey on Parties, 4. But as to convicts, see 33 & 34 Vict. c. 23, ss. 8, 30.

not take the case out of the general rule (a). This decision does not expressly overrule any earlier authority (and there is such authority) (b) for the proposition that she may be sued alone. But it is conceived that such must be the result.

It appears on the whole as the result of the authorities that the wife of an alien husband who has never been in England may bind herself by contract if she purports to contract as a *feme sole*. In two cases at nisi prius Lord Kenyon held that the wife of an alien who has left the kingdom for some time, and is not known to have any intention of returning, may be sued alone on contracts made by her after his departure (c); the reason being, it seems, that in the case of an alien no *animus revertendi* could be presumed. But in a third action against the same defendant (the husband having in the meantime returned to England and gone away again) Lord Ellenborough took a different view and nonsuited the plaintiff. He thought such an action could be maintained only when the husband had never been in the kingdom (in which case the right of action had already been upheld by the Court of Common Pleas) (d); here the husband had lived with his wife in England, and was under no legal disability to rejoin her. The Court refused a rule to set aside the nonsuit (e). In a more modern case, again, the Court of Exchequer thought that Lord Ellenborough had conceded too much, and that such an action was in no case maintainable without showing that on the particular occasion the wife actually contracted as a *feme sole* (f). But it is submitted that as to the

(a) *De Wahl v. Braune*, 1 H. & N. 178, 25 L. J. Ex. 343. Perhaps it may be doubted whether 'civil death' was ever really appropriate as a term of art in English courts except 'when a man entereth into religion [i.e. a religious order in England] and is professed': in that case he could make a will and appoint executors (who might be sued as such for his debts, F. N. B. 121, O), and if he did not, his goods could be administered (Litt. a. 200, Co. Litt. 131 b). Bracton, however, speaks of outlawry (426 b) as well as religious profession (301 b) as *mors civilis*. The Roman *mors civilis* was a pure legal fiction, introduced not to create dis-

abilities, but to obviate the inconvenient results of disabilities otherwise created. (Sav. Syst. 2. 164.) As to the *mort civile* of modern French law (now abolished since 1854), see *ib.* 151 sqq.

(b) *Derry v. Duchess of Mazarine*, 1 Ld. Raym. 147.

(c) *Walford v. Duchess de Pienne*, 2 Esp. 554, *Franks v. same defendant*, *ib.* 587; Dicey on Parties, 296.

(d) *De Gaillon v. L'Aigle*, 1 Bos. & P. 357.

(e) *Kay v. Duchess de Pienne*, 3 Camp. 123.

(f) *Barden v. Keverberg*, 2 M. & W. 61, 6 L. J. Ex. 66.

former point it would be enough to show that the husband never had an English domicil, or at all events that he never resided in England. It seems unreasonable that the mere fact of his having at some time been in England (it may be for a day or even less) should make all the difference.

Custom of London as to married woman trading alone.

“By the custom of London, if a *feme covert*, the wife of a freeman, trades by herself in a trade with which her husband does not intermeddle, she may sue and be sued as a *feme sole*, and the husband shall be named only for conformity; and if judgment be given against them, she only shall be taken in execution.” (Bacon, Abr. Customs of London, D.) This custom applies only to the city courts (*a*), and even there the formal joinder of the husband is indispensable. But if acted upon in those courts it may be pleaded as matter of defence in the superior courts (*b*), though they do not otherwise notice the custom (*a*).

Contracts with husband as to separation, &c., may be good.

In certain exceptional cases in which the wife has an adverse interest to the husband she is not incapable of contracting with him. Where a wife had instituted a suit for divorce, and she and her husband had agreed to refer the matters in dispute to arbitration, her next friend not being a party to the agreement, the House of Lords held that under the circumstances of the case she might be regarded as a *feme sole*, that the agreement was not invalid, and that the award was therefore binding (*c*).

The real object of the reference and award in this case having been to fix the terms of a separation, it has since been held that a Court of Equity will not refuse to enforce an agreement to execute a deed of separation merely because it has been made between the husband and wife without the intervention of a trustee (*d*). It by no means follows from these decisions, however, that agreements of this kind create any legal right of action, though it might not be safe to assert that such cannot be their effect in any conceivable case.

Statutory exceptions: Judicial separa-

Statutory exceptions.

By the Act constituting the Court for Divorce and Matrimonial Causes, 20 & 21 Vict. c. 85, a wife judicially separated

- (a) *Caudell v. Shaw*, 4 T. R. 361.
- (b) *Beard v. Webb*, 2 Bos. & P. 93.
- (c) *Bateman v. Countess of Ross*, 1 Dow, 235.
- (d) *Vansittart v. Vansittart*, 4 K.

& J. 62, 27 L. J. Ch. 222: but the agreement not enforceable for other reasons: affirmed on appeal, 2 De G. & J. 249, 27 L. J. Ch. 289, but no opinion given on this point.

from her husband is to be considered whilst so separated as a *feme sole* for the purposes of (*inter alia*) contract, and suing and being sued in any civil proceeding (s. 26) (a); and a wife deserted by her husband who has obtained a protection order is in the same position while the desertion continues (s. 21). This section is so worded as when taken alone to countenance the supposition that the protection order relates back to the date of desertion. It has been decided, however, that it does not enable the wife to maintain an action commenced by her alone before the date of the order (b). These provisions are extended by an amending Act in certain particulars not material to be noticed here (21 & 22 Vict. c. 108, ss. 6-9); and third parties are indemnified as to payments to the wife, and acts done by her with their permission, under an order or decree which is afterwards discharged or reversed (s. 10). The words as to "suing and being sued" in this section are not confined by the context to matters of property and contract, but are to be liberally construed: a married woman who has obtained a protection order may sue in her own name for a libel (c).

The following statutory exceptions are created by the Married Women's Property Act, 1870. By s. 1 the earnings, &c., of a married woman acquired or gained after the passing of the Act in any separate occupation are made her separate property; and by s. 11 she may sue alone for them. The capital, stock-in-trade, &c., of a business or employment carried on by a woman at the date of her marriage, and afterwards continued on her separate account with her husband's consent, are held to be also protected by necessary implication (d). Still more clearly would this be the case as to new stock-in-trade, &c., acquired out of profits. The Act does not give any new remedy to the creditors of a married woman for debts incurred by her in the course of any separate undertaking; nor does it in any way affect their

(a) The same consequences follow *a fortiori* on a dissolution of marriage, though there is no express enactment that they shall: *Wilkinson v. Gibson*, 4 Eq. 162: see also, as to the divorced wife's rights, *Wells v. Malbon*, 31 Beav. 48, *Fitzgerald v. Chapman*, 1 Ch. D. 563, *Burton v. Sturgeon* (C. A.), 2 Ch. D. 318.

(b) *Midland Ry. Co. v. Pye*, 10

C. B. N. S. 179, 30 L. J. C. P. 314.

(c) *Ramsden v. Brearley*, L. R. 10 Q. B. 147. She can give a valid receipt for a legacy not reduced into possession before the date of the order: *Re Coward & Adam's Purchase*, 20 Eq. 179.

(d) *Ashworth v. Outram* (C. A.), 5 Ch. D. 923.

equitable rights (of which presently) against her separate estate. Probably the presumption of an intention to bind the separate estate (which we shall find to exist when a wife living apart from her husband incurs debts), would be extended to all debts contracted by her in the course of a separate business whether living apart from her husband or not. S. 11 further gives her for the protection of such wages, earnings, &c., as are declared to be her separate property by s. 1, and of any chattels or other property purchased or obtained by means thereof for her own use, the same remedies both civil and criminal as if such wages, &c., belonged to her as an unmarried woman. It has been decided that under this section a married woman carrying on a separate business may bring an action alone against her bankers for dishonouring her cheque, or for not duly presenting or not giving her notice of the dishonour of a bill of exchange acquired by her in the course of such business (*a*). Both the words and the operation of the enactment however are less extensive than those of 20 & 21 Vict. c. 85, ss. 25, 26. It does not enable a married woman to contract or deal with property as a *feme sole*: for instance, to transfer without her husband's concurrence stock to which she is entitled for her separate use. Her remedy is to get the stock registered in her own name as a married woman entitled for her separate use, which by s. 3 she can do as to any sum in the public funds not less than 20*l.*, and then that section enables her to deal with it (*b*).

By s. 4, in like manner, a married woman entitled to fully paid up shares in a company, or stock or debentures free from liability, may have them registered as her separate property (*c*), but she is not expressly enabled to sue for dividends in her own name. By s. 10 a married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, "and the contract in such policy shall be as valid as if made with an unmarried woman."

Renewal
of leases by
statute.

There is a statutory provision for renewal of leases by married women : see 11 Geo. 4 & 1 Wm. 4, c. 65.

(*a*) *Summers v. City Bank*, L. R. 9 C. P. 580.

(*b*) *Howard v. Bank of England*, 19 Eq. 295.

(*c*) As to the duty of the company see *Reg. v. Carnatic Ry. Co.* L. R. 8 Q. B. 299.

Separate Estate.

The most important and peculiar qualification of the general Separate estate: Power of alienation. incapacity of married women to enter into contracts is their power, now recognized after much confusion and difference of opinion, of executing acts in the nature of contract which are binding on any separate estate of which they have power to dispose. It would be convenient, but we shall see that it would not be quite accurate, to say more shortly that a married woman is in equity capable of contracting to the extent of her separate estate. The anomalies from which the subject is not yet wholly free are due to the fragmentary and discontinuous manner in which the doctrine of separate use has been gradually put together. When the practice of settling property to the separate use of married women first became common, it seems probable that neither the persons interested nor the conveyancers had any purpose in their minds beyond excluding the husband's marital right so as to secure an independent income to the wife. The various forms of circumlocution employed in all but very modern settlements to express what is now sufficiently expressed by the words "for her separate use" will at once suggest themselves as confirming this. In course of time, however, it was found that by recognizing this separate use the Court of Chancery had in effect created a new kind of equitable ownership, to which it was impossible to hold that the ordinary incidents of ownership did not attach. The power of disposition *inter vivos* (which is all that bears on our present subject) was accordingly admitted, including alienation by way of mortgage or specific charge as well as absolutely; and we find it laid down in general terms about a century ago that a *feme covert* acting with respect to her separate property is competent to act as a *feme sole* (a). Nevertheless the equitable ownership of *real estate* by means of the separate use, carrying as incidents the same full right of disposition by deed or will that a *feme sole* would have, has been fully recognized only by quite recent decisions (b): but this by the way. From a mortgage or specific charge on separate property to a formal

(a) *Hulme v. Tenant*, 1 Wh. & T. L. C. In *Peacock v. Monk*, 2 Ves. Sr. 190, there referred to by Lord Thurlow, no such general rule is expressed. As to the recognition of

separate property by Courts of Common Law, see *Duncan v. Cashin*, L. R. 10 C. P. 554.

(b) *Taylor v. Meads*, 4 D. J. S. 597; *Pride v. Bubb*, 7 Ch. 64.

Power to bind the separate estate by formal instruments: historical view given by V.-C. Kindersley.

contract under seal, such as if made by a person *sui juris* would even then have bound real estate in the hands of his heir, we may suppose the transition did not seem violent; and instruments expressing such a contract to be entered into by a married woman came to be regarded as in some way binding on any separate property she might have. In what way they were binding was not settled for a good while, for reasons best stated in the words of V.-C. Kindersley's judgment in *Vaughan v. Vanderstegen* (a), where he gave an historical summary of the matter:

"The Courts at first ventured so far as to hold that if" a married woman "made a contract for payment of money by a written instrument with a certain degree of formality and solemnity, as by a bond under her hand and seal, in that case the property settled to her separate use should be made liable to the payment of it; and this principle (if principle it could be called) was subsequently extended to instruments of a less formal character, as a bill of exchange or promissory note, and ultimately to any written instrument. But still the Courts refused to extend it to a verbal agreement or other assumpsit, and even as to those more formal engagements which they did hold to be payable out of the separate estate, they struggled against the notion of their being regarded *as debts*, and for that purpose they invented reasons to justify the application of the separate estate to their payment without recognizing them as debts or letting in verbal contracts. One suggestion was that the act of disposing of or charging separate estate by a married woman was in reality the execution of a power of appointment (b), and that a formal and solemn instrument in writing would operate as an execution of a power, which a mere assumpsit would not do. . . . Another reason suggested was that as a married woman has the right and capacity specifically to charge her separate estate, the execution by her of a formal written instrument must be held to indicate an intention to create such special charge, because otherwise it could not have any operation."

Earlier doctrines now untenable.

Both these suggestions are now untenable, as indeed V.-C. Kindersley then (1853) judged them to be (c); the theory of specific charge was revived in the later case of *Shattock v. Shattock* (d), but this must be considered as overruled

(a) 2 Drew. 165, 180.

(b) *E.g. Duke of Bolton v. Williams*, 2 Ves. at p. 149.

(c) *Cp. Murray v. Barlee*, 3 M. & K. 209, where the arguments show the history of the doctrine, *Owens v.*

Dickenson, 1 Cr. & Ph. 48, 53, where the notions of power and charge are both dismissed as inapplicable by Lord Cottenham.

(d) 2 Eq. 182, 193.

by the judgment in the Privy Council presently to be mentioned. One or two other suggestions—such as that a married woman should have only such power of dealing with her separate estate as might be expressly given her by the instrument creating the separate use—were thrown out about the beginning of this century (a), during a period of reaction in which the doctrine was thought to have gone too far, but they did not find acceptance; and the dangers which gave rise to these suggestions were and still are provided against in another way by the device of the restraint on anticipation, as curious an example as any that English law presents of an anomaly grafted on an anomaly (b).

It seems needless to enter into any discussion of the earlier authorities. At present the *locus classicus* on the subject is the judgment of Turner, L. J., in *Johnson v. Gallagher* (c), in which those authorities are fully reviewed, and which is now strengthened by the full approval of the Judicial Committee in *London Chartered Bank of Australia v. Lemprière* (d). It had already been distinctly followed in the Court of Appeal in Chancery as having placed the doctrine upon a sound foundation (e). The general result, so far as now concerns us, appears to be to this effect:

“Not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their separate estates” (3 D. F. J. 514): and property settled to a married woman’s separate use for her life, with power to dispose of it by deed or will, is for this purpose her separate estate (f).

These “general engagements” are subject to the forms imposed by the Statute of Frauds or otherwise (g) on the contracts made *in pari materia* by persons competent to contract generally, but not to any other form: there is no general rule that they must be in writing.

A “general engagement” is not binding on the separate estate unless it appear “that the engagement was made with reference

(a) See *Jones v. Harris*, 9 Ves. 486, 497; *Parkes v. White*, 11 Ves. 209, 220, sqq.; and collection of cases 5 Ves. 17, note.

(b) See Lord Cottenham’s judgment in *Tullett v. Armstrong*, 4 M. & Cr. 393, 405.

(c) 3 D. F. J. 494, 509 sqq.

(d) L. R. 4 P. C. 572.

(e) *Picard v. Hine*, 5 Ch. 274.

(f) *Mayd v. Field*, 3 Ch. D. 587, 593.

(g) As to this see *infra*, p. 73.

to and upon the faith or credit of that estate" (3 D. F. J. 515).

Whether it was so made is a question of fact to be determined on all the circumstances of the case: it is enough "to show that the married woman intended to contract so as to make herself, that is to say, her separate property, the debtor" (L. R. 4 P. C. 597).

Such intention is presumed in the case of debts contracted by a married woman living apart from her husband (3 D. F. J. 521). (This tallies with the rule of common law which in this case excludes even as to necessities the ordinary presumption of authority to pledge the husband's credit: see notes to *Manby v. Scott* in 2 Sm. L. C.)

The like intention is inferred where the transaction would be otherwise unmeaning, as where a married woman gives a guaranty for her husband's debt (a) or joins him in making a promissory note (b).

The "engagement" of a married woman differs from a contract, inasmuch as it gives rise to no personal remedy against the married woman, but only to a remedy against her separate property (c), which may be lost by her alienation of such property before suit (3 D. F. J. 515, 519, 520-2).

In cases where specific performance would be granted as between parties *sui juris*, a married woman may enforce specific performance of a contract made with her where the consideration on her part was an engagement binding on her separate estate according to the above rules; and the other party may in like manner enforce specific performance against her separate estate (d).

The term
"engage-
ment."

The term *engagement*, though in itself a vague one, seems to be conveniently appropriated to this special purpose of expressing that which in the case of a person *sui juris* would be a contract, but in the case of a married woman cannot be a contract because it creates no personal obligation even in equity.

(a) *Morrell v. Cowan*, 6 Ch. D. 166, where no attempt was made to dispute that the guaranty, though not expressly referring to the separate estate, was effectual to bind it.

(b) *Davies v. Jenkins*, 6 Ch. D. 728.

(c) For the form of decree for specific performance against a mar-

ried woman's separate estate see *Picard v. Hine*, 5 Ch. 274.

(d) The cases cited in Sug. V. & P. 206, so far as inconsistent with the modern authorities (see *Picard v. Hine*, last note, *Pride v. Bubb*, 7 Ch. 64) must be considered as overruled.

A word is certainly wanted for the purpose, and this is an apt one as having no other technical meaning, and as suggesting the close analogy (but no more than analogy) of the thing signified to a true contract. One might be tempted to speak of the *quasi-contract* of a married woman, but such a novel use would be much too remote from the established meaning of the term.

The language of the Judicial Committee we have cited as to the married woman's intention of making herself—*that is, her separate property*—the debtor, suggests that the separate estate may be regarded as a sort of artificial person created by Courts of Equity, and represented by the beneficial owner as an agent with full powers, somewhat in the same way as a corporation sole is represented by the person constituting it for the time being. As a contract made by the agent of a corporation in his employment can bind nothing but the corporate property (a), the engagement of a married woman can bind nothing but her separate estate. This way of looking at it is no doubt artificial, but may possibly be found to assist in the right comprehension of the doctrine.

The separate estate a quasi artificial person.

Some instances of ordinary contracts which may be incidental to the management and enjoyment of separate estate, so that it would be highly inconvenient if the separate estate were not bound by them, are given in the judgment of the Judicial Committee above referred to (L. R. 4 P. C. at p. 594).

Applications.

One application of the modern doctrine which deserves to be specially noticed is that a married woman may be a shareholder in a company, and in the event of a winding-up a contributory in respect of her separate estate, if there is nothing special to prevent it in the constitution of the company (b). And a shareholder who has acquired shares by a married woman's direction and as a trustee for her separate use on the understanding that they are to be paid for out of her separate estate is entitled to be indemnified by the separate estate against all calls and liabilities incurred in respect of the shares (c). There

(a) Unless, of course, he contracts in such a way as to make it also his own personal contract.

(b) *Matthewman's ca.* 3 Eq. 781.

(c) *Butler v. Cumpston*, 7 Eq. 61.

appears to be nothing to prevent a married woman from entering into an ordinary partnership as far as concerns her separate estate (a). It also seems possible that in this way she may become a partner with her own husband. For administrative purposes, at least, the Court may act as if that relation existed (b).

A married woman's engagement relating to her separate property will have the same effect as the true contract of an owner *sui juris* in creating an obligation which will be binding on the property in the hands of an assignee with notice (c).

Certain unsettled questions. Where no separate estate at date of "engagement," is after-acquired separate estate bound?

So far the principles may be taken as settled: various questions of detail, however, are still open. If a married woman enters into an engagement, having no separate property at the time, will this bind any separate property she may afterwards acquire? No decision on this point is known to us. If the engagement be made expressly with reference to alleged separate property or to the expectation of acquiring it, there seems to be no reason why it should not be good by estoppel (d) at all events. But if it be made only under circumstances from which according to *Johnson v. Gallagher* (*supra*) an intention to pay out of separate estate would be presumed, it is difficult to see how such a presumption can arise when there is no separate estate at the time. A vague intention to pay, or hope of being paid, out of any after-acquired separate estate may perhaps exist, but is hardly probable enough to be reasonably presumed.

Accordingly the burden of proof would in such a case be upon the creditor to show that the engagement was in fact made on the faith of supposed separate property. There would be no such difficulty if the engagement were a true contract creating a personal obligation; but this we have seen it is not.

What becomes of "engage-

Again, if a married woman become *sui juris* by the death of the husband, judicial separation or otherwise, what becomes

(a) Lindley, 1. 86.

(b) *Re Childs*, 9 Ch. 508.

(c) Per Jessel, M. R. *Warne v. Routledge*, 18 Eq. 500.

(d) A married woman may be bound by estoppel, per James, L. J. 7 Ch. at p. 778, and see *Sharpe v. Foy*, 4 Ch. 35, *Re Lush's trusts*, *ib.*

591. It is sometimes said that infants and *femes covert* can do no act to estop themselves (7 T. R. at p. 539): but probably this applies only to false representations of their legal capacity, as in *Cannam v. Farmer*, 8 Ex. 698, *supra*, p. 59.

of the debts of her separate estate? It is impossible to say ^{ments" on} that they become legal debts. Not to speak of the technical ^{cessation} difficulties in which the substantial difficulty would express ^{of cover-} itself in practice, this would be to create a new right and liability quite different from those originally created by the parties. In equity there is no doubt a remedy, but to what extent? It may be contended with some plausibility (and has in sundry cases been assumed rather than decided) that the creditor's original right was against the separate property and that only; that he is indeed not to be deprived of his right because the property has ceased to exist as separate property; but that on the other hand there is no reason why his position should be improved, and that all he can do is to follow in the hands of the owner or her representatives the separate estate held by her at the time when she became *sui juris* (a). It seems not improbable, however, that the Court may when the point again distinctly arises take another step towards treating the engagement as a real contract, and may refuse thus to limit the liability of the party or her estate. Another kindred question ^{Liability} is this: Can the wife's separate estate be held liable for her ^{of separate} debts contracted before marriage? Apart from recent legislation ^{estate for} it seems no less difficult to hold that the coverture and the ^{debts} existence of separate property enable the creditor to substitute ^{before} for a legal right a wholly different equitable right, than to hold ^{marriage.} that the cessation of the coverture turns that sort of equitable right into a legal debt. It has been decided that after the husband's bankruptcy the wife's separate estate is liable in equity to pay her debts contracted before the marriage (b); but the V.-C. seems to have decided the case partly on the ground that the bankruptcy was evidence that the settlement of the property to the wife's separate use was fraudulent as against her

(a) This view seems to have been taken in the Court below in *Johnson v. Gallagher*, where the bill was filed after the death of the husband: see 3 D. F. J. 495, and the decree appealed from at p. 497: and it appears in earlier cases, as *Field v. Soule*, 4 Russ. 112, which, however, are now of little or no authority, since they involve the exploded theory that the separate estate can be

affected only by way of charge or appointment. In *Heatley v. Thomas*, 15 Ves. 596, and *Nail v. Punter*, 5 Sim. 555, it also does not appear whether the woman had any other property *sui juris*.

(b) *Chubb v. Stretch*, 9 Eq. 555, following *Biscoe v. Kennedy*, briefly reported in marginal note to *Hulme v. Tenant*, 1 Bro. C. C. 17, and 1 Wh. & T. L. C. 483 (4th ed.).

creditors. Before the Debtors Act, 1869, when a married woman and her husband were sued at law on a debt contracted by her before the marriage and either the husband and wife or the wife alone had been taken in execution, the wife was entitled to be discharged only if she had not separate property out of which the debt could be paid (*a*); and an order for payment can now be made under s. 5 of the Debtors Act on a married woman, and the existence of sufficient separate estate would justify commitment in default (*b*). But the practice of the Courts in the exercise of this kind of judicial discretion does not throw much light on the question of a direct remedy. It only amounts to the recognition of something more than a mere moral duty but less than a legal duty, as in the cases (noticed in another chapter, see Ch. XII.) where the payment of costs, &c., which could not be directly recovered is nevertheless indirectly enforced.

Married
Women's
Property
Act, 1870,
and
Amend-
ment Act,
1874.

However, a wife who has been married since the Married Women's Property Act, 1870, came into operation (9th August, 1870), may be sued alone [at law or in equity? probably both, as there are no express words to exclude the general equitable jurisdiction over separate estate] for her debts contracted before marriage, and any property belonging to her for her separate use is liable to satisfy such debts (s. 12). This extends to separate property subject to a restraint on anticipation (*c*). The same section enacted without qualification that the husband should not be liable; so that where there was no settlement the creditor had no remedy at all during the coverture. But this is repealed as to marriages taking place after the 30th July, 1874, by the Amending Act of that year (37 & 38 Vict. c. 50); a husband and wife married after that date may be jointly sued for her ante-nuptial debts (s. 1) and the husband is liable to the extent of the assets specified in s. 5, which comprise all interests acquired by him in right of his wife or by any settlement of her property on the marriage, and any property of which a disposition may have been

(*a*) *Ivens v. Butler*, 7 E. & B. 159, 26 L. J. Q. B. 145; *Jay v. Amphlett*, 1 H. & C. 687, 32 L. J. Ex. 176.

(*b*) *Dillon v. Cunningham*, L. R. 8 Ex. 23. Here the married woman had been sued alone, and there was

no plea of coverture: but probably the same course would be taken in the case of a judgment against husband and wife for the wife's debt *duum sola*.

(*c*) *Sanger v. Sanger*, 11 Eq. 470.

made by her with his consent "with the view of defeating or delaying her existing creditors."

Again, a married woman's engagement with respect to her separate estate is not bound by any peculiar forms. But is it on the other hand bound in every case by the ordinary forms of contract? In other words, can an instrument or transaction ever take effect as an engagement binding separate estate which could not take effect as a contract if the party were *sui juris*? The analogies we have hitherto pursued, and on which the leading modern authorities are founded, would certainly lead us to say yes to the first form of the question, and no to the second. That is to say, the creditor must first produce evidence appropriate to the nature of the transaction which would establish a legal debt against a party *sui juris*, and then he must show, by proof or presumption as explained above, an intention to make the separate estate the debtor. There is, however, a decision the other way. In *McHenry v. Davies* (a) a married woman, or rather her separate estate, was sued in equity on a bill of exchange indorsed by her in Paris. It was contended for the defence, among other things, that the bill was a French bill and informal according to French law. The M. R. held that this was immaterial, for all the Court had to be satisfied of was the general intention to make the separate estate liable, of which there was no doubt. This reasoning is quite intelligible on the assumption that engagements bind separate estate only as specific charges; the fact that the instrument creating the charge simulated more or less successfully a bill of exchange would then be a mere accident (b). The judgment bears obvious marks of this theory; we have seen indeed that it was expressly adopted by the same judge in an earlier case (c), and we have also seen that it is no longer tenable. Take away this assumption (as it must now be taken away) and the reasoning proves far too much: it would show that the indorser *sui juris* of a bad bill of exchange ought to be bound notwithstanding the law merchant, because he has expressed his intention to be bound. The true doctrine

How far is a married woman's "engagement" bound by the ordinary forms of contract?

McHenry v. Davies: quare.

(a) 10 Eq. 88.

(b) Note, however, that in the case of parties *sui juris* a bill of exchange cannot be treated as an equitable assignment: *Ex parte Shellard*, 17

Eq. 109; *Shand v. Du Buisson*, 18 Eq. 283. Nor a cheque: *Hopkinson v. Foster*, 19 Eq. 74.

(c) *Shattock v. Shattock*, 2 Eq. 182; *supra*, p. 66.

being that the "engagement" differs from a contract not in the nature of the transaction itself, but in making only the separate estate the debtor, it follows that in all that relates to the transaction itself the ordinary rules and limitations of contract apply. In *Johnson v. Gallagher* it is assumed that a married woman's engagements concerning her separate interest in real estate must satisfy the conditions of the Statute of Frauds (a). An engagement which if she were *sui juris* would owe its validity as a contract to the law merchant must surely in like manner satisfy the forms and conditions of the law merchant. The result is that we venture to submit that the authority of *McHenry v. Davies* (b) on this point must now be regarded as exceedingly doubtful.

Statute of
Limita-
tion.

There is some authority, but of a most inconclusive kind, for the position that the Statute of Limitation, or rather its analogy, does not apply to claims against the separate estate: namely an obscurely reported case at the Rolls in 1723, when the modern doctrine had not come into existence (c), and an Irish case in recent times where the Chancellor followed this authority, and adhered to his opinion on appeal, the Lord Justice dissenting (d). It is conceived that at least in an English court of equity the question would at present be quite open.

Can the
separate
estate be
made
liable on a
quasi-con-
tract?

It is said that a married woman's separate estate cannot be made liable as on a contract implied in law (*quasi-contract* in the proper sense) as for instance to the repayment of money paid by mistake or on a consideration which has wholly failed (e). But the decisions to this effect belong (with one exception) to what we have called the period of reaction, and are distinctly grounded on the exploded notion that a "general engagement," even if express, is not binding on the separate estate.

The exception is the modern case of *Wright v. Chard* (f), where V.-C. Kindersley held that a married woman's separate estate was not liable to refund rents which had been received by

(a) 3 D. F. J. at p. 514.

(b) 10 Eq. 88.

(c) *Norton v. Turrille*, 2 P. Wms. 144, and see 8 Ir. Ch., appx.

(d) *Vaughan v. Walker*, 6 Ir. Ch. 471, 8 ib. 458.

(e) 3 D. F. J. 512, 514, referring to *Duke of Bolton v. Williams*, 2 Ves. 188; *Jones v. Harris*, 9 Ves. 493, and *Aguilar v. Aguilar*, 5 Madd. 414.

(f) 4 Drew. 673, 685: on appeal, 1 D. F. J. 567, but not on this point.

her as her separate property but to which she was not in fact entitled. But the language of the judgment reduces it to this, that in the still transitional state of the doctrine, and in the absence of any precedent for making the separate estate liable in any case without writing (this was in 1859, *Johnson v. Gallagher* not till 1861), the V.-C. thought it too much for a court of first instance to take the new step of making it liable "in the absence of all contract:" and he admitted that "the modern tendency has been to establish the principle that if you put a married woman in the position of a *feme sole* in respect of her separate estate, that position must be carried to the full extent, short of making her personally liable." On the whole it may perhaps be fairly thought that the question is open. If it may be so treated, the test of liability would seem on principle to be whether the transaction out of which the demand arises had reference to or was for the benefit of the separate estate.

It will be easily perceived that the difficulties and anomalies which attend this subject would be almost if not entirely removed by holding (as suggested by V.-C. Kindersley's dictum just quoted) that a married woman's disability to contract means only disability to create an immediate personal obligation enforceable against her as such during the coverture; that her engagements during coverture (excluding of course all contracts made by her either in fact or by presumption of law as her husband's agent) are true contracts on which the personal remedy is suspended; and that the equitable remedy against the separate estate, when there is any, comes in simply as a temporary substitute for this. It is true that such a doctrine would be convenient and consistent, and it is also true that modern decisions have gone some way in this direction. But it is impossible to say that such is at present the doctrine of English courts of equity. Whether it may yet be made so by a decision or series of decisions of the Court of Appeal is by no means a visionary question; but there are hardly sufficient materials for forming any decided opinion upon it.

Modern
tendency
towards
full appli-
cation of
the prin-
ciples of
contract.

The present state of the law has been thus summed up by the Master of the Rolls:—

"A married woman is liable—or rather her separate estate is liable (for there is no personal liability as far as she is concerned)

—to make good all contracts which are made by her with express reference to the separate estate, or which from the nature of the contract itself must be intended to be so referred ; but she is not liable even for general contracts which from their nature cannot be so referred ; *a fortiori* she is not liable for general torts, but her husband is liable. Her separate estate may be liable for a fraud relating to the separate estate, that is, dealing with the separate estate by way of fraudulent representation—but not for an independent wrong or breach of trust (*a*).

Agree-
ment by
married
woman to
execute
power
apart from
separate
use.

Lord St. Leonards states it as the better opinion “that a married woman having a power of appointment can bind herself by a contract to sell the property,” *i.e.* independently of any interest for her separate use that she may have : Mr. Dart seems to think this is confined to contracts executed with the formalities required by the power, which would reduce the proposition to a very narrow scope. The cases cited appear to furnish no direct authority (*b*). On principle one would think such an agreement can have no other operation than as an execution or imperfect execution of the power itself.

III.—LUNATICS AND DRUNKEN PERSONS.

Drunken-
ness and
Lunacy.

It will be convenient to consider these causes of disability together, since (at any rate by the modern understanding of the law) drunken men and lunatics are in the same position with regard to the capacity of contracting. Three different theories on the matter have at different times been entertained in English courts and supported by respectable authority. Before we specially mention these it will be best to dispose of the points on which there has not been any substantial conflict.

Lunatic's
marriage
void.

First, as to the peculiar and exceptional contract of marriage. The marriage of a lunatic is void, and there is no ground for requiring a less degree of sanity for a valid marriage than for the making of a will or for other purposes (*c*). Apart from this, it seems to have been admitted from the first both at law and in equity, on the one hand that a lunatic is incapable of contracting

General
law:
Points
always

(a) *Wainford v. Heyl*, 20 Eq. 321, 324.

(b) Sug. V. & P. 206, Dart V. & P. 2. 1000 ; *Stead v. Nelson*, 2 Beav. 245, is the case most nearly in

point.

(c) *Hancock v. Peaty*, L. R. 1 P. & D. 335, 341. The statute 15 Geo. 2, c. 30 is rep. by the Stat. Law Revision Act, 1873.

or doing other acts in the law after he has been found lunatic by inquisition and while the commission of lunacy is in force (a); and on the other hand that a lunatic who has lucid intervals is capable of contracting during those intervals (b). admitted:
lunatic's
contract in
lucid inter-
val good.

It is equally settled both at law and in equity, without any real authority that we are aware of to the contrary, that a lunatic or his estate may be liable *quasi ex contractu* for necessities supplied to him in good faith (c); and this applies to all expenses necessarily incurred for the protection of his person or estate, such as the costs of the proceedings in lunacy (d). A husband is liable for necessities supplied to his wife while he is lunatic; for the wife's authority to pledge his credit for necessities is not a mere agency, but springs from the relation of husband and wife and is not revoked by the husband's insanity (e). In the same way drunkenness or lunacy would be no answer to an action for money had and received, or for the price of goods furnished to a drunken or insane man and kept by him after he had recovered his reason: in this last case, however, his conduct in keeping the goods would be evidence of a new contract to pay for them, which would be a real contract inferred in fact, not a quasi-contract implied in law (f). Liability
for neces-
saries, &c.

There is also express authority (which one would think hardly necessary) to show that contracts made by a man of sound mind who afterwards becomes lunatic are not invalidated by the lunacy (g). We now come to the different theories above mentioned.

1. The first is that the drunkenness or lunacy of the party is no ground whatever for avoiding the contract. For "as for a drunkard who is *voluntarius daemon*, he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it." (Co. Litt. 247 a.) And although this moral reason does not exist in the case of lunacy, yet the lunatic is equally bound, for "no man of full age shall History of
opinions as
to contract
of lunatic,
&c., in
general.
Coke: No
man shall
stultify
himself.

(a) *Beverley's ca.* 4 Co. Rep. 123 b; Bacon, Abr. Idiots and Lunatics, (F.)

(b) *Beverley's ca.*; *Hall v. Warren*, 9 Ves. 605, cp. *Selby v. Jackson*, 6 Beav. 192.

(c) *Baxter v. Earl of Portsmouth*, 5 B. & C. 170, s.c. more fully, nom. *Bagster v. Earl P.*, 7 D. & R. 614.

(d) *Williams v. Wentworth*, 5 Beav. 325; *Stedman v. Hart, Kay*, 607.

(e) *Read v. Legard*, 6 Ex. 636, 20 L. J. Ex. 309.

(f) *Gore v. Gibson*, 13 M. & W. 623, 14 L. J. Ex. 151.

(g) *Owen v. Davies*, 1 Ves. Sr. 82.

be received in any plea by the law to disable his own person, but the heir may well disable the person of the ancestor for his own advantage in such case." (Litt. 247 *b* ; acc. *Beverley's ca.* 4 Rep. 123 *b*, where however it is said that even the heir or executor could not avoid matter of record, and another idle reason is given for the general rule, *viz.*, that the party when he recovers his memory cannot remember what he did when he was *non compos mentis*). As regards drunkenness, this doctrine is on the face of it a wholly mistaken application of a principle which is properly applicable to criminal offences and merely wrongful acts, but has nothing to do with liabilities *ex contractu*. As regards lunacy, it is a merely frivolous technicality. However it is confidently stated as law by Coke ; and we find it adopted by Lord Tenterden as late as 1827, though, as we shall immediately see, it had long before that time been exploded by other judges (*a*). It seems at least doubtful whether it was really supported by the authorities Coke had before him. At any rate they were conflicting, and Fitzherbert (F. N. B. 202 *b*) was expressly against him, considering the case of an infant as analogous. Bracton, following the civil law (*b*), said : "Furiosus autem stipulari non potest nec aliquod negotium agere, quia non intelligit quid agit" (fol. 100 *a*, cf. 165 *b* ; and see Fleta, 3, 3. §§ 8, 10). But it is unnecessary to discuss this further.

First modern theory: Contract void for absolute incapacity, or voidable for fraud, according to circumstances.

2. The next theory is to the following effect : If a man is so drunk or so insane as not to know what he is about, he cannot have that consenting mind which is indispensable to the formation of a contract, and his agreement is therefore merely void. But if his mind is only so confused or weak that he cannot be said not to know what he is about, but yet is incapable of fully understanding the terms and effect of his contract, and if this is known to the other party, then he may indeed contract, but the contract will be voidable at his option, on the ground not of his own incapacity, but of the other party's fraud in taking advantage of his weakness, though such weakness be short of incapacity. According to this the first class of cases would be reckoned with others in which agreements are absolutely void

(*a*) *Brown v. Jodrell*, 3 C. & P. 30.

(*b*) Inst. 3. 19, 8 ; Gai. 3. 106.

For exposition of the Roman Law

see Savigny, Syst. 3. 83—86 : and cp. Pothier, Obl. §§ 49—51.

for want of real consent (as to which see *post*, Ch. VIII.) and the second would come under the general head of fraud.

We find the first branch of this opinion decidedly adopted in common law practice in the last century and the earlier part of this, no doubt by way of reaction against Coke's extravagant dogmas. Lunacy was held admissible as evidence under a plea of *non est factum*, i.e. as showing the lunatic's act to be wholly void (a); and the like was said of drunkenness (b). Lord Ellenborough distinctly laid down that when the existence of an agreement between the parties was in issue, it was completely negatived by the intoxication of one party at the time of making the alleged agreement; and this was approved by the Court of King's Bench (c).

The same view is to be found in the modern case of *Gore v. Gibson* (d), where however it was not material to the decision, as the drunkenness of the defendant and the plaintiff's knowledge of it were specially pleaded. And both branches of the doctrine were recognized in equity and are very completely stated in a judgment of Sir W. Grant (e).

"I think a Court of Equity ought not to assist a person to get rid of any agreement or deed merely upon the ground of his having been intoxicated at the time: I say merely upon that ground; as if there was . . . any unfair advantage made of his situation or . . . any contrivance or management to draw him into drink, he might be a proper object of relief in a Court of Equity. As to that extreme state of intoxication that deprives a man of his reason, I apprehend that even at law it would invalidate a deed obtained from him while in that condition."

He also said that a Court of Equity ought not to assist a person who has obtained an agreement from another in a state of intoxication; but this is a mere dictum, and if it means that intoxication not such as to prevent the party from understanding the effect of his contract is of itself a sufficient ground for refusing specific performance, it is distinctly contradicted by later decisions (f).

(a) *Yates v. Boen*, 2 Str. 1104.

(b) *Buller*, N. P. 172.

(c) *Pitt v. Smith*, 3 Camp. 33.

(d) 13 M. & W. 623, 14 L. J. Ex. 151.

(e) *Cooke v. Clayworth*, 8 Ves. 12, 15. The references to earlier

cases are purposely omitted.

(f) *Lightfoot v. Heron*, 3 Y. & C. Ex. 586; *Shaw v. Thackray*, 1 Sm. & G. 537 (but with some hesitation, on the ground that the real defendant was not the vendor but a subsequent purchaser).

Justifiable
in theory
but not
conve-
nient.

This doctrine is quite intelligible, and in principle there is nothing to be said against it. But the distinction between inability to understand so much as the nature of a transaction (which would make it wholly void) and inability to form a free and rational judgment of its effect (which if known to the other party would make it only voidable) is too fine and doubtful to be convenient in practice. The confusion of mind generally produced by drunkenness is exquisitely described by Chaucer in the Knight's Tale :

" A dronkë man wot well he hath an hous,
But he not [*i.e.*, ne wot] which the rightë way is thider."

Whether in any particular case a state of consciousness of this kind does or does not amount to absolute deprivation of a consenting mind for the purposes of contract is a question which it would be probably impracticable, and certainly undesirable, for a court of justice to enter upon. The same considerations apply with almost or quite the same force to the capacity of a lunatic.

The reason why this inconvenience so long escaped notice appears to be that in the greater number of cases it is not necessary to decide whether the agreement was originally void or only voidable.

Present
theory:
contract
voidable if
the lunacy,
&c., known
to other
party: this
led up to
by distinc-
tion as to
executed
contracts.

3. The third opinion, which has now prevailed, is that the contract of a lunatic or drunken man who by reason of lunacy or drunkenness is not capable of understanding its terms or forming a rational judgment of its effect on his interests is not void but only voidable at his option ; and this only if his state is known to the other party. The way was prepared for this by decisions establishing, in the case of executed contracts, an exception to the supposed rule of absolute nullity, which exception may be stated as follows :

When a contract has been entered into in good faith with a person who appears and is believed to be of sound mind, but who is in fact of unsound mind, and the contract has been performed so that the parties cannot be replaced in their original position, it cannot be set aside by the person of unsound mind or his representatives.

Molton v.
Camroux.

This principle was long ago acted upon in equity, but without

any decision as to the validity of the contract in law (a): the judgment which fully settled it was that of the Exchequer Chamber in *Molton v. Camroux* (b). The action was brought by administrators to recover the money paid by the intestate to an assurance and annuity society as the price of two annuities determinable with his life. The intestate was of unsound mind at the date of the purchase, but the transactions were fair and in the ordinary course of business, and his insanity was not known to the society. It was held that the money could not be recovered; the rule being laid down in the Exchequer Chamber more positively than in the Court below, and in these terms: "The modern cases show that when that state of mind [lunacy or drunkenness, even if such as to prevent a man from knowing what he is about] was unknown to the other contracting party, and no advantage was taken of the lunatic [or drunken man], the defence cannot prevail, especially where the contract is not merely executory but executed in the whole or in part, and the parties cannot be restored altogether to their original positions."

The context shows that the statement was considered equally applicable to lunacy and drunkenness, and the law thus stated involves though it does not expressly enounce the proposition that the contract of a lunatic or drunken man is not void but at most voidable. The general rules as to the rescission of a voidable contract are then applicable, and among others the rule that it must be rescinded, if at all, before it has been executed so that the former state of things cannot be restored: which is the point actually decided. The decision itself has been fully accepted and acted on both at law (c) and in equity (d), though the merely voluntary acts of a lunatic, e.g., a voluntary disentailing deed (a class of acts with which we are not here concerned) remain invalid (e). It was also observed that the decision had an important bearing on the general question whether "a conveyance executed [or a contract made] by a lunatic is absolutely void in the absence of notice or fraud" (f). However the complete judicial interpretation of the result of *Molton v. Camroux* Development of the doc-

(a) *Niell v. Morley*, 9 Ves. 478.

(b) 2 Ex. 487, 4 Ex. 17; 18 L. J. Ex. 68, 356.

(c) *Beavan v. M'Donnell*, 9 Ex. 309, 23 L. J. Ex. 94.

(d) *Price v. Berrington*, 3 Mac. & G. 486, 495, revg. a. c. 7 Ha. 394; *Elliot v. Ince*, 7 D. M. G. 475, 488.

(e) *Elliot v. Ince*, sup.

(f) 3 Mac. & G. at p. 498.

trine: *Matthews v. Baxter.* was not given till the recent case of *Matthews v. Baxter* (a). The declaration was for breach of contract in not completing a purchase: plea, that at the time of making the alleged contract the defendant was so drunk as to be incapable of transacting business or knowing what he was about, as the plaintiff well knew: replication, that after the defendant became sober and able to transact business he ratified and confirmed the contract. As a merely void agreement cannot be ratified this neatly raised the question whether the contract were void or only voidable: the Court held unanimously (one member of it expressly on the authority of *Molton v. Camroux*) that it was only voidable, and the replication therefore good.

The special doctrine of courts of equity with regard to partnership (which is a continuing contract) is quite in accordance with this: it has long been established that the insanity of a partner does not of itself operate as a dissolution of the partnership, but is only a ground for dissolution by the Court (b).

American authority seems to agree with the recent conclusions of our own courts (c).

Statement
of rule as
now
settled.

The law seems then on the whole to be now settled to the following effect: A contract made by a person who is drunk or of unsound mind so as to be incapable of understanding its effect is voidable at that person's option, unless the other contracting party did not believe and had not reasonable cause to believe that he was drunk or of unsound mind.

It is unnecessary to express the point actually decided in *Molton v. Camroux*, for that, as we have said, follows on general principles from the contract being only voidable. The express mention of reasonable cause for believing the party to be incapable may perhaps be in strictness also superfluous, as the existence of reasonable grounds of knowledge is in such a case very strong evidence of actual knowledge.

The Indian Contract Act treats these cases somewhat differently, making the agreement void (s. 12):

“A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it, and of forming a rational judgment as to its effect upon his interests.

(a) L. R. 8 Ex. 132.
(b) Lindley, 1. 235.

(c) Hilliard on Contracts, 1. 311.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations.

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts."

This however must be read in connexion with s. 65 :—

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it."

This is, on the whole, simpler than the English law settled by *Molton v. Camroux*, and probably not less convenient. But the authorities corresponding to the substance of s. 65 are with us in a state very far removed from its clearness and simplicity, being mostly disguised in the form of exceptions to a technical and now obsolete rule of pleading (a) : so that the adoption by our courts of rules corresponding to those of s. 12 might have failed by itself to lead to satisfactory results.

The possibility of hardship to persons who have dealt in good faith with a lunatic who was apparently sane is, it would seem, disregarded by the Indian Act as being in practice exceedingly small : and the liability of a lunatic to pay for necessaries is laid down in the chapter "Of certain Relations resembling those created by Contract," s. 68.

PART 2. OF ARTIFICIAL PERSONS.

IN a complex state of civilization, such as that of the Roman Artificial Empire, or still more of the modern progressive peoples, it constantly happens that legal transactions have to be undertaken, ^{persons:} ^{their} ^{nature.} rights acquired and exercised, and duties incurred

(a) By a succession of sole or joint holders of an office of a public nature involving the tenure and administration of property for public purposes :

(β) By or on behalf of a number of persons who are for the time being interested in carrying out a common enterprise or object.

(a) See notes to *Cutter v. Powell* in 2 Sm. L. C.

Such enterprise or object may or may not further involve purposes and interests of a public nature. The rights and duties thus created as against the world at large are in truth and substance wholly distinct from the rights and duties of the particular persons immediately concerned in the transactions. Those persons deal with interests beyond their own, though in many cases including or involving them, and it is not to their personal responsibility that third parties dealing with them are accustomed to look.

This distinction (the substantial character of which it is important to bear in mind) is conveniently expressed in form by the Roman invention, adopted and largely developed in modern systems of law, of constituting the official character of the holders for the time being of the same office, or the common interest of the persons who for the time being are adventurers in the same undertaking, into an artificial person (*a*) or ideal subject of legal capacities and duties. If it is allowable to illustrate one fiction by another, we may say that the artificial person is a fictitious substance conceived as supporting legal attributes. It would not be very difficult to show, were it not a matter of metaphysical rather than of legal interest, that what we call the artificial identity of a corporation is within its own sphere and for its own purposes just as real as any other identity (*b*). This creature of the law becomes, within the limits assigned to its existence, "a body distinct from the members composing it, and having rights and obligations distinct from those of its members" (*c*). Note, however, that this kind of fiction is not confined to legal usage or legal purposes. In the case of an ordinary partnership the firm is treated by mercantile usage as an artificial person, but is not recognized as such by the law (*c*); and other voluntary and unincorporated associations are constantly treated as artificial persons in the language and transactions of every-day life. An even more remarkable

(*a*) Fr. *corps* or *être moral*, *personne morale* (but this does not necessarily import capacity to sue or be sued in a corporate name); Germ. *juristische Person*.

(*b*) In the United States a corporation duly created by the laws of any state is treated as a person dwelling in, and therefore a citizen of, that state within the meaning of the constitutional provision which

enables the Federal courts to entertain suits between citizens of different states. See *Marshall v. Baltimore & Ohio Railr. Co.*, 16 Howard 314.

(*c*) Lindley, l. 213. The name of the firm may now be used in pleadings, but the complete recognition of the firm as an artificial person involves much more than this.

instance is furnished by the artificial personality which is ascribed to the public journals by literary custom or etiquette, and is so familiar in writing and conversation that its curiosity most commonly escapes attention. But with these artificial persons by private convention, if we may so call them, we are not further concerned.

The only artificial persons which in England have a legal existence fall under one of the descriptions we have marked (α) and (β), and are known as corporations (α). These are either sole, *i.e.*, of which there is only one member at a time; or aggregate, *i.e.*, of which there are several members. The principal instances of corporations sole are ecclesiastical persons; of late years the holders of divers public offices have been made corporations sole by statute (β). The Sovereign is also said to be a corporation sole, but *sui generis*. In the case of a corporation sole the power of administering the corporate property and binding the corporate funds is for the most part not left to him alone, but belongs wholly or in part to a corporation aggregate of which the corporation sole is one member, or to some other body; or is guarded by statutory precautions. And it seems that a corporation sole cannot enter into a contract (except with statutory authority, or as incidental to an interest in land) in his corporate capacity; at any rate the right of action on a contract made with him cannot pass to his successor, but only to his executors, unless by special custom (γ); there is such a custom (for a limited

Corporations sole and aggregate: the latter only need be considered.

(α) The Roman law shows that other kinds of artificial persons are at least conceivable: *e.g.* the *hereditas jacens*, to which however Savigny denies that this character really belonged; Syst. § 102 (3. 363-373). And see p. 69 *supra*, as to our own Separate Estate. Savigny restricts the use of the term corporation so as to exclude charitable foundations: *op. cit.* 243-4. The difficulty set forth in his note arises simply from the absence in Roman law of any term of art co-extensive with our Trust: not having at hand the conception of a corporation as trustee, he supposes the artificial person in such cases to be not the incorporated governing body, but the object of the charitable foundation itself.

(β) Such are the Official Trustee of Charity Land, the Secretary of State for India, the Solicitor to the Treasury (39 & 40 Vict. c. 18).

(γ) Generally "bishops, deans, parsons, vicars, and the like cannot take obligation to them and their successors, but it will go to the executors." *Arundel's ca.* Hob. 64; *acc. Howley v. Knight*, 14 Q. B. 240; the case in the Year Book referred to by the reporters (at p. 244; P. 20 E. 4, 2, pl. 7) shows the rule and its antiquity very plainly; so Co. Lit. 46 b "regularly no chattel can go in succession in a case of a sole corporation;" it was otherwise in the case of the head of a religious house, as he could not make a will, Ro. Ab. 1. 515. And see Grant on Corporations 629, 633, *sqq.*

purpose) in the case of the Chamberlain of the City of London (*a*). But, in short, no principles of general application or interest are to be found in this quarter, and we may practically confine our attention to corporations aggregate.

So far as regards these, the classification indicated above by the letters (α) and (β) corresponds in a general way to the division of them into *non-trading* and *trading*, which we shall see is of great importance as to the form of corporate contracts: the class (β) is further sub-divided according as the purposes of the corporation are or are not of a public character, and this sub-division is likewise of great importance as touching the matter and extent of corporate contracts.

We have to ascertain (1) what contracts corporate bodies can make and (2) how they are to be made. The second of these questions is reserved for the following chapter on the Form of Contracts.

The first cannot be adequately treated except in connexion with a wider view of the capacities, powers, and liabilities of corporations in general: and it will therefore be expedient if not absolutely necessary to introduce considerations, and refer to doctrines, which might at first sight seem irrelevant.

Capacities
and liabilities
of Corporation
as limited
by the nature
of an
artificial
person.

The capacities of corporations are limited

(i) By natural possibility, *i.e.*, by the fact that they are artificial and not natural persons:

(ii) By legal possibility, *i.e.*, by the restrictions which the power creating a corporation may impose on the legal existence and action of its creature.

First, of the limits set to the powers and liabilities of corporations by the mere fact that they are not natural persons. The requirement of a common seal (of which elsewhere) is sometimes said to spring from the artificial nature of a corporation. The fact that it is not known in Scotland is however enough to show that it is a mere positive rule of English law. The correct and comprehensive proposition is that a corporation can do no act except by an agent (for even if all the members concur they are but agents); and it follows that it cannot do or be answerable for anything of a strictly personal nature. It cannot commit a

(*a*) Bacon Ab. 2. 582, Customs of London, B; *Howley v. Knight*, *supra*.

crime in the strict sense, such as treason, felony, perjury, or offences against the person (*a*); though any or all of the members or officers of a corporation who should commit acts of this kind (*e.g.*, should levy war against the Queen) under colour of the corporate name and authority would be individually liable to the ordinary consequences. Nor can it enter into any strictly personal contract or relation (*a*). On the other hand, though able to act only by an agent, it is subject to the same liabilities as any other employer for the acts of its agents done in the course of their employment, and is therefore liable *ex delicto* for damage resulting from their negligence in the course of such employment, and also must answer for anything done by them which, though positively wrongful in itself under its particular circumstances, belong to a class of acts which is authorized and within the scope of their business (*b*). And notwithstanding the apparent contradiction of imputing a fraudulent intention to a corporate body, it may be made liable in an action of deceit for the fraud of its agent committed in the course of the corporation's affairs (*c*). And the same principle is extended to make it generally subject to all liabilities incidental to its corporate existence and acts, though the remedy may be in form *ex delicto* or even criminal. Although it cannot commit a real crime, "it may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large" and

As to acts
of agents.

Indictable
in some
cases.

(*a*) *Reg. v. G. N. of Eng. Ry. Co.*, 9 Q. B. 315, 326 : nor, it is said, can it be excommunicated, for it has no soul : 10 Co. Rep. 32*b*. So it cannot do homage : Co. Lit. 66*b*. Nor can it be subject to the jurisdiction of a customary court whose process is exclusively personal : *London Joint Stock Bank v. Mayor of London*, 1 C. P. D. 1. We are not aware that any English writer has thought it necessary to state in terms that a corporation cannot be married or have any next of kin. The statement is to be found in Savigny, Syst. 3. 239 ; but is in part not quite so odd as it looks, as in Roman law *patria potestas* and all the family relations arising therefrom might be acquired by Adoption.

(*b*) It is unnecessary to enter at large upon the cases on this head, of which there are a great number :

among the latest are *Bayley v. Manchester &c. Ry. Co.* L. R. 7 C. P. 415, 8 C. P. 148 ; *Moore v. Metrop. Ry. Co.* L. R. 8 Q. B. 36 ; *Bolingbroke v. Swindon Local Board*, L. R. 9 C. P. 575.

(*c*) *Barwick v. Eng. Joint Stock Bank*, L. R. 2 Ex. 259 : notwithstanding dicta to the contrary in *Western Bank of Scotland v. Addie*, L. R. 1 Sc. & D. 145, see the later case of *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 C. P. 394. Savigny's statement that a corporation cannot commit a "true delict" (3. 317) is so qualified as perhaps not to be inconsistent with the English doctrine : however such questions as have arisen in recent times on the dealings of commercial corporations were obviously not present to his mind.

may be indicted for a nuisance produced by the execution of its works or conduct of its business in an improper or unauthorized manner, as for obstructing a highway or navigable river (*a*). A corporation may even be liable by prescription, or by having accepted such an obligation in its charter, to repair highways, &c., and may be indictable for not doing it (*b*). Likewise it may be convicted and fined under a penal statute regulating the trade carried on by it (*c*). However a steamship company has been held in equity to be not indictable under the Foreign Enlistment Act of Geo. 3, and therefore not entitled to refuse discovery, which in the case of a natural person would have exposed him to penalties under the act (*d*); but the decision seems mostly grounded on the language of the particular statute. As to the difficulty of imputing fraudulent intention to a corporation, which has been thought to be peculiarly great, it may be remarked that no one has ever doubted that a corporation may be *relieved against* fraud to the same extent as a natural person. There is exactly the same difficulty in supposing a corporation to be deceived as in supposing it to deceive, and it is equally necessary for the purpose of doing justice in both cases to impute to the corporation a certain mental condition—of intention to produce a belief in the one case, of belief produced in the other—which in fact can exist only in the individual mind of the person who is its agent in the transaction. Lord Langdale found no difficulty in speaking of two railway companies as “guilty of fraud and collusion” though not in an exact sense (*e*). However the members of a corporation cannot even by giving an express authority in the name of the corporation make it responsible, or escape from being individually responsible themselves, for a wrongful act (as trespass in removing an obstruction of an alleged highway) which though not a personal wrong is of a class wholly beyond the competence of the corporation, so that if lawful it could not have been a cor-

But cannot be bound by acts of even all its members when of a non-corporate character.

(*a*) *Reg. v. G. N. of Eng. Ry. Co.*, 9 Q. B. 315; per Cur. p. 326.

(*b*) See Grant on Corporations, 277, 283; Angell & Ames on Corporations, §§ 394-7; Wms. Saund. 1. 614, 2. 473.

(*c*) The contrary was not suggested in *Aerated Bread Co. v. Gregg*,

L. R. 8 Q. B. 355, where such a conviction was affirmed on the construction of the statute.

(*d*) *King of Two Sicilies v. Willcox*, 1 Sim. N. S. 335.

(*e*) 12 Beav. 382.

porate act (a). Likewise it is not competent to the governing body or the majority, or even to the whole of the members of a corporation for the time being, to appropriate any part of the corporate funds to their private use (unless in some manner distinctly warranted by the constitution); for it is not to be supposed that *all the members* of the corporation are equivalent to *the corporation* so that they can do as they please with corporate property. Lord Langdale held on this principle that the original members of a society incorporated by charter, who had bought up the shares of the society by agreement among themselves, were bound to account to the society for the full value of them (b). The fallacy of the opposite assumption (*viz.* that a corporation has no rights as against its unanimous members) is easily exposed by putting the extreme case of the members of a corporation being by accident reduced till there is only one left, who thereupon unanimously appropriates the whole corporate property to his own use. It is perhaps worth while to observe that writers on the civil law have laid down the powers of majorities in corporate affairs with an extraordinary latitude, assigning unlimited authority to the majority of a properly convened meeting in most cases, and to the whole body of existing members in any case. But Savigny has shown this to be not only false in principle but unwarranted by the Roman law, the authorities relied on being in truth special provisions for the government of municipal corporations which were never intended to be of unlimited application (c). His exposition is interesting for the clearness with which he enforces the fundamental proposition that a corporation is not identical with the sum of its existing members, but otherwise it throws little if any light on the problems arising from the modern development and multiplication of corporate bodies in the English and allied systems of law.

It is further to be observed that such cases as those last mentioned have but a slight and perhaps a misleading likeness to those where we have to determine the rights of strangers

(a) *Mill v. Hawker*, L. R. 9 Ex. 309; no judgment on this part of the case in Ex. Ch. L. R. 10 Ex. 92.

(b) *Society of Practical Knowledge v. Abbott*, 2 Beav. 559, 567. Cp. Sav. Syst. 3. 283, 335.

(c) Sav. Syst. 3. 329 sqq. §§ 97-99. The illustration in our text is given at p. 350, note, with the remark, "Hier ist gewiss Einstimmigkeit vorhanden."

against the corporation arising out of contract or dispositions of property. In *Society of Practical Knowledge v. Abbott* (a) the principle is that, quite apart from the nature of its particular objects, a corporation does not exist for the sake of the persons who are the members at any one time, as is also shown by the rule of common law that they have no power of their own mere will to dissolve it. No corporate property can be treated as the property of the members, or divisible among them, unless there appears from the nature and constitution of the corporation an intention that it shall be so treated. In *Mill v. Hawker* (b), again, the removal of an obstruction to a highway is a thing which by its nature cannot be a corporate act at common law. The common law right is founded on the use of the highway by the person removing the obstruction, but a corporation cannot use a highway. No doubt a corporation might have a statutory power or be under a statutory duty to remove obstructions, and the true question in the case was whether any such power or duty had been conferred on highway boards. The majority of the court held that it had not. But if such had been the case, the right so conferred would still have been wholly distinct from the right of a natural person at common law to remove things which obstruct his lawful use of a highway (c).

As limited
by positive
law. Con-
flicting
theories of
corporate
powers.

We now come to consider the far more difficult and complicated question of special restrictions. The importance of this subject is quite modern ; it arose from the general establishment of railway companies and others of a like nature incorporated by special Acts of Parliament, and has been continued and increased by the multiplication of joint stock companies, building societies, &c., which are incorporated or made "quasi-corporations" under general Acts. On this there have been many decisions, much discussion, and some real conflict of judicial opinions. There are two opposite views by which the consideration of the matter may be governed, and they may be expressed thus :

1. A corporation is an artificial creature of the law, and has no existence except for the purposes for which it was created.

(a) 2 Beav. 559.

(b) L. R. 9 Ex. 309. see at p. 318.

(c) On the nature of corporate action in general cp. Hobbes, *Behemoth*, part 4. *ad init.* (6. 359, ed.

Molesworth), and *Leviathan*, pt. 1. c. 16 ; and on its artificial character, Maine, *Early History of Institutions*, 352.

No act exceeding the limits of those purposes can be the act of the corporation, and no one can be authorized to bind the corporation to such an act. In each particular case, therefore, the question is: Was the corporation *empowered* to bind itself to this transaction?

2. A corporation once duly constituted has all such powers and capacities of a natural person as in the nature of things can be exercised by an artificial person. Transactions entered into with apparent authority in the name of the corporation are presumably valid and binding, and are invalid only if it can be shown that the Legislature has expressly or by necessary implication deprived the corporation of the power it naturally would have had of entering into them. The question is therefore: Was the corporation *forbidden* to bind itself to this transaction?

As Mr. Justice Lindley puts it (a), the difference is "as to whether the act of incorporation is to be regarded as conferring unlimited powers except where the contrary can be shown; or whether alleged corporate powers are not rather to be denied unless they can be shown to have been conferred either expressly or by necessary implication."

As we shall often have to refer to these views, we may call (1) the doctrine of *special capacities* and (2) the doctrine of *general capacity*.

There is much to be said on principle for the theory of special capacities. Most if not all corporations are established for tolerably well defined purposes, which persons dealing with them can ascertain without difficulty. They are certainly not intended to do anything substantially beyond those purposes, and a reasonable and liberal construction of their powers may be trusted to prevent the application of the doctrine from causing any real hardship (b). This theory was the prevalent one in the earlier period of the discussion. For a while the common law courts took it without question from the courts of equity, where for particular reasons to be mentioned afterwards it appeared in a somewhat more positive form and was maintained for a longer

(a) 1. 265.

(b) See judgment of Coleridge, J.

Mayor of Norwich v. Norfolk Ry. Co.
4 E. & B. 397, 24 L. J. Q. B. 105, 119.

time. It is adopted by some of the best English writers (*a*), and in America Kent stated it (long before the subject had attained its present development in England) as the modern and even as the obvious doctrine (*b*). It also seems to have been taken for granted by those who framed the modern statutes defining the powers of incorporated companies (*c*); which, if the opposite view be correct, are redundant in permission and defective in prohibition.

“General capacity :”
this now
the pre-
vailing
doctrine.

The theory of general capacity, on the other hand, may well be supported on principle as tending to call the attention of the Legislature more distinctly to the limits it may be proposed to assign to corporate powers, and ultimately to promote the general convenience by making those limits more certain. It is also favoured by the general analogies of the law. There is a fallacy latent in the phrase of the other theory. When we speak of an artificial person as a creature of the law, we mean its legal existence, not its particular rights and capacities. If legal existence as a subject of rights and duties is once admitted by a fiction, why not admit its ordinary incidents so far as they are physically possible? All rights are in one sense creatures of the law, and it is in a special sense by creation of the law that artificial persons exist at all: but when you have got your artificial person, why call in a second special creation to account for its rights?

Powers of
statutory
corpora-
tions
limited to
purposes of
incorpora-
tion.

This last view seems on the whole to have in its favour a preponderance of modern authority. It is subject however to the important qualification that “a statutory corporation created by Act of Parliament for a particular purpose is limited as to all its powers by the purposes of its incorporation as defined by that Act” (*d*). This makes the conflict between the two theories much less sensible in practice than might at first sight be expected. The considerations on which the quali-

(*a*) Leake on Contracts, 258; Lindley, 1. 268.

(*b*) Kent, Comm. 2. 298-9 (in the later editions, however, this is much qualified by the note at p. 278.) The Supreme Court of the U. S. certainly seems to have so held, at all events as to corporations created by statute: *Bank of Augusta v. Earle*, 18 Peters

519, 587.

(*c*) See L. R. 9 Ex. 266.

(*d*) Lord Selborne in *Ashbury Ry. Carriage Co. v. Riche*, L. R. 7 H. L. 653, at p. 693. This is now the leading case on the subject, and, together with other authorities, will be more particularly mentioned hereafter.

fication rests are in themselves foreign to the law of corporations as such, but they are constantly present in the modern cases and are often decisive.

These considerations are derived (1) from the law of partnership : (2) from principles of public policy.

Reasons
for the
limitation
derived—
1. From
partner-
ship law.

1. In trading corporations the relation of the members or shareholders to one another is in fact a modified (*a*) contract of partnership, which in the view of courts of equity is governed by the ordinary rules of partnership law so far as they are not excluded by the constitution of the company.

Now it is a well settled principle of partnership law that no majority of the partners can bind a dissenting minority, or even one dissenting partner, to engage the firm in transactions beyond its original scope (*b*). In the case, therefore, of a corporation whose members are as between themselves partners in the business carried on by the corporation, any dissenting member is entitled to restrain the governing body or the majority of the company from attempting to involve the company in an undertaking which does not come within its purposes as defined by its original constitution. Courts of Equity have been naturally called upon to look at the subject chiefly from this point of view, that is, as giving rise to questions between shareholders and directors, or between minorities and majorities. Such questions do not require the court to decide whether an act which dissentients may prevent the agents of the company from doing in its name might not nevertheless, if so done by them with apparent authority, be binding on the corporate body, or a contract so made be enforceable by the other party who had contracted in good faith. This distinction, clear and important as it is, has not always been kept in sight. But further, according to the law of partnership a partner can bind the firm only as its agent : his authority is *prima facie* an extensive one (*c*), but if it is specially restricted by agreement between the partners, and such restriction is known to the person dealing with him, he

Rights of
dissenting
partners.

Doctrine
as to
limited
agency.

(*a*) Namely by provisions for transfer of shares, limited liability of shareholders, and other things which cannot (at least with convenience or completeness) be made incident to a partnership at common law.

(*b*) Lindley, l. 621 sqq.

(*c*) Lindley, l. 248 ; per James L. J. *Baird's* ca. 5 Ch. 733 ; Story on Agency, §§ 124, 125, adopted by the Judicial Committee in *Bank of Australasia v. Breillat*, 6 Moo. P. C. 152, 195.

In public companies limits of directors' authority presumed to be known.

cannot bind the firm to anything beyond those special limits (*a*). Limits of this kind may be imposed on the directors or other officers of a company by its constitution; and if that constitution is embodied in a special Act of Parliament, or in a deed of settlement or articles of association registered in a public office under the provisions of a general act, it is considered that all persons dealing with the agents of the corporation must be deemed to have notice of the limits thus publicly set to their authority. The corporation is accordingly not bound by anything done by them in its name when the transaction is on the face of it in excess of the powers thus defined (*b*). And it is important to remember that in this view the resolutions of meetings however numerous, and passed by however great a majority, have of themselves no more power than the proceedings of individual agents to bind the partnership against the will of any single member to transactions of a kind to which he did not by the contract of partnership agree that it might be bound.

Irregularities in the conduct of the internal affairs of the body corporate, even the omission of things which as between shareholders and directors are conditions precedent to the exercise of the directors' authority, will not however invalidate acts which on the face of them are regular and authorized: third parties dealing in good faith are entitled to assume that internal regulations (the observance of which it may be difficult or impossible for them to verify) have in fact been complied with (*c*).

These applications of partnership law materially cut down the results of the common law theory of general capacity so far as regards its application to almost all incorporated companies of modern origin.

Assent of all the members will remove objections on this head.

But it is to be observed that in the ordinary law of partnership there is nothing to prevent the members of a firm, if they are all so minded, from extending or changing its business without limit by their unanimous agreement. As a matter of pure corporation law, the unanimity of the members is of little importance: it may supply the want of a formal act of the governing body in some cases (*d*), but it can in no case do more. As a

(*a*) Lindley, 1. 344-9.

(*b*) Lindley, 1. 266, 351.

(*c*) Lindley, 1. 267 sqq.

(*d*) Even this is in strictness hardly consistent with the leading principle that if A, B, C. . . &c.

matter of mixed corporation and partnership law this unanimity may be all-important as being a ratification by all the partners of that which if any one of them dissented would not be the act of the firm : for although the corporate body of which they are members is in many respects different from an ordinary partnership, it is treated, and justly treated, as a partnership for this purpose. It would seem, then, that the unanimous assent of the members will remove all objections founded on the principles of partnership, and will so far leave the corporation in full possession of its common law powers. There are nevertheless many transactions which even the unanimous will of all the members cannot make binding as corporate acts. For the reasons which determine this we must seek farther.

2. Most corporations established in modern times by special acts of Parliament have been established expressly for special purposes the fulfilment of which is considered to be for the benefit of the public as well as of the proprietors of the undertaking, and for this reason they are armed with extraordinary powers and privileges. Whatever a corporation may be capable of doing at common law, there is no doubt that unusual powers given by the Legislature for a special purpose must be employed only for that purpose : if Parliament empowers either natural persons or a corporation to take J. S.'s lands for a railway, J. S. is not bound to let them take it for a factory or to let them take an excessive quantity of land on purpose to resell it at a profit (a). If Parliament confers immunity for the obstruction of a navigable river by building a bridge at a specified place that will be no excuse for obstructing it in the like manner elsewhere. Moreover we cannot stop here. It is impossible to say that an incorporation for special objects and with special

2. Public policy : corporations formed for special purposes. Powers must not be used to defeat purposes of incorporation.

are incorporated to them and their successors by the name of X, then $A + B + C + \dots \&c.$ are not $= X$.

(a) See *Galloway v. Mayor of London*, L. R. 1 H. L. at p. 43, *Lord Carington v. Wycombe Ry. Co.* 3 Ch. 377, 381. Nor may a company hold regattas or let out pleasure-boats to the inconvenience of the former owner on a piece of water acquired by them under their

Act for a reservoir : *Bostock v. N. Staffordshire Ry. Co.*, 3 Sm. & G. 283, 292. But a statutory corporation acquiring property takes it with all its rights and incidents as against strangers, subject only to the duty of exercising those rights in good faith with a view to the objects of incorporation : *Swindon Waterworks Co. v. Wilts & Berks Canal Navigation Co.* L. R. 7 H. L. 697, 704, 710.

powers gives a restricted right of using those powers, but leaves the use of ordinary corporate powers without any restriction. The possession of extraordinary powers puts the corporation for almost all purposes and in almost all transactions in a wholly different position from that which it would have held without them; and apart from the actual exercise of them it may do many things which it was otherwise legally competent to do, but which without their existence it could practically never have done. Any substantial departure from the purposes contemplated by the Legislature, whether involving on the face of it a misapplication of special powers or not, would defeat the expectations and objects with which those powers were given. It may be too much to say that by the mere act of incorporation for a particular purpose the Legislature forbids the corporate body to do anything remote from that purpose. But when, in the public interest and in consideration of a presumed benefit to the public, it adds extraordinary powers, it must be taken in the same interest to forbid the corporation to do that which will tend to defeat the policy of the whole scheme; and to forbid in the sense not only of attaching penal consequences to such acts when done, but of making them wholly void if it is attempted to do them. Accordingly contracts of railway companies and corporations of a like public nature which can be seen to import a substantial contravention of the policy of the incorporating acts are held by the courts to be void, and are often spoken of as *mala prohibita*, and illegal in the same sense that a contract of a natural person to do anything contrary to the provisions of an Act of Parliament is illegal (a). Others prefer to say that the Legislature, acting indeed on motives of public policy, has simply disabled the corporation from doing acts of this class; "to regard the case as one of incapacity to contract rather than of illegality, and the corporation as if it were non-existent for the purpose of such contracts" (b).

The difference, however, is but a verbal one, and both modes of expression have their convenience. The former seems required

(a) Blackburn, J. in *Taylor v. Chichester & Co.* L. R. 2 Ex. 379; and (Brett and Grove, JJ. concurring) in *Riche v. Ashbury Ry. Carriage Co.* L. R. 9 Ex. 262, 266; Lord Hatherley, s. c. nom. *Ashbury*

Ry. Carriage Co. v. Riche, L. R. 7 H. L. at p. 689.

(b) Archibald, J. (Keating and Quain, JJ. concurring) L. R. 9 Ex. 298; Lord Cairns, L. R. 7 H. L. at p. 672; Lord Selborne, *ib.* 694.

in such a case as that where it was decided that the agreement of a third person to procure a company to do something foreign to its proper purposes is illegal and void (a).

There is another consideration of a somewhat similar kind which applies equally to what may be called public companies in a special sense—i.e., such as are invested with special powers for carrying out defined objects of public interest—and ordinary joint-stock companies which have no such powers. The provisions for limited liability and for the easy transfer of shares in both sorts of companies must be considered, in their modern form and extent at least, as a statutory privilege. These provisions also invest the companies with a certain public character and interest quite apart from the nature of their particular objects in each case, but derived from the fact that they do professedly exist for particular objects. By far the greater part of their capital represents the money of shareholders who have bought shares in the market without any intention of taking an active part in the management of the concern, but on the faith that they know in what sort of adventure they are investing their money, and that the company's funds are not being and will not be applied to other objects than those set forth in its constitution as declared by the act of incorporation, memorandum of association, or the like. This is not a mere repetition of the objections grounded on partnership law; the incoming shareholder may protect himself for the future, but the mischief may be done or doing at the time of the purchase: and besides it may fairly be said that persons other than shareholders deal with the company on the faith of its adhering to its defined objects. They are entitled to "know that they are dealing with persons who can only devote their means to a given class of objects, and who are prohibited from devoting their means to any other purpose" (b). The assent of all those who are shareholders at a given time will of course bind them individually, but leaves this difficulty untouched (c). If I buy shares in a company which professes to make railway plant in England I have a right

Interest of
the public
as in-
vestors.

Buyers of
shares in
market
and per-
sons giving
credit to
the com-
pany have
a right to
assume
that the
company's
professed
objects are
adhered to.

(a) *McGregor v. Dorer & Deal Ry. Co.* 18 Q. B. 618, 22 L. J. Q. B. 69. See per Erle, J., in *Mayor of Norwich v. Norfolk Ry. Co.* 4 E. & B.

397, 24 L. J. Q. B. 105.

(b) Lord Hatherley, L. R. 7 H. L. at p. 684.

(c) See L. R. 9 Ex. 270, 291.

to assume that its funds are not pledged to pay for making a railway in Spain or Belgium, and it is the same if dealing with it as a stranger I lend money or otherwise give credit to it. Accordingly the provisions of the Companies Act, 1862, are to be considered as having been enacted in the interests of "in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and secondly, the outside public, and more particularly those who might be creditors of companies of this kind" (*a*). The House of Lords has unanimously decided (after an equal division of opinion in the Court of Exchequer Chamber) that by the general scheme and on the true construction of the Act a company registered under it is forbidden to enter, even with the unanimous assent of the shareholders for the time being, into a contract foreign to its objects as defined in the memorandum of association (*b*).

Selection
of autho-
rities.

We may now give some specimens of the authorities, showing how the three distinct topics of the powers of corporations as such (*a*), and the application to them of (*β*) the rules of partnership and (*γ*) the principles of public policy, have been treated, sometimes together and sometimes separately. We shall endeavour to arrange our citations in an order approximately following that in which these topics have been mentioned, according as one or the other is most prominent: a precise division would be impossible without breaking up passages from the same judgment into many fragments, but we shall use the indicating letters (*a β γ*) to call attention to the presence of the special class of considerations respectively denoted by them in this place. And it may be observed that some of those dicta which seem most strongly to adopt on the first head the theory of limited special capacities occur in the immediate neighbourhood of statements coming under one or both of the other heads, which in all probability have had an appreciable, though it may be an undesigned operation in modifying the form of their expression.

Capacities
incident to
incorpora-

Capacities incident to incorporation generally. Resolution of Ex. Ch. in the case of *Sutton's Hospital*, 10 Co. Rep. 30b :—

- (*a*) Lord Cairns, L. R. 7 H. L. at p. 667. *Co. v. Riche*, L. R. 7 H. L. 653; in Ex. and Ex. Ch. L. R. 9 Ex. 224, 249.
(*b*) *Ashbury Ry. Carriage & Iron*

"When a corporation is duly created all other incidents are tacite annexed . . . and therefore divers clauses subsequent in the charter are not of necessity, but only declaratory, and might well have been left out. As, 1. by the same to have authority, ability, and capacity to purchase ; but no clause is added that they may alien &c. and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, &c. ; that is also declaratory, for when they are incorporated they may make or use what seal they will. [So Shepp. Touchst. 57 : 'although it be a corporation that doth make the deed, yet they may seal with any other seal besides their common seal, and the deed never the worse.'] 4. To restrain them from aliening or demising, but in a certain form ; that is an ordinance testifying the King's desire, but it is but a precept and doth not bind in law."

This resolution does not seem to have been very material to the decision of the case, but anything reported by Coke is by inveterate custom exempt from criticism of this kind ; moreover it is supported by the opinion of Hobart, C. J., who says that a power to make by-laws, though given by a special clause in all incorporations, is needless ; "for I hold it to be included by law in the very act of incorporating, as is also the power to sue, to purchase, and the like." (Hob. 211, pl. 268). This very positive statement was all but lost sight of in modern cases (a) till it was cited by Blackburn, J., in *Riche v. Ashbury Ry. Carriage Co.*, L. R. 9 Ex. 263-4 :—

"This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And further that an attempt to forbid this on the part of the King, even by express negative words, does not bind at law (b). Nor am I aware of any authority in conflict with this case. . . . I take it that the true rule of law is that a corporation at Common Law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation."

We must now shortly trace the growth of the doctrine of *special capacities* in *Colman v. Eastern Counties Ry. Co.*, 10 Beav. 1, and similar cases. The subject was novel, many-sided, and embarrassing ;

tion. *Sutton's Hospital case.*

Growth of the contrary doctrine in

(a) It is cited by Erle, J., in *Bostock v. N. Staffordshire Ry. Co.* 4 E. & B. 798, 819, 24 L. J. Q. B. 225.

(b) That is, a corporate act in

violation of the conditions of the charter is not void, but the Crown has a remedy by proceeding by *sc. fa.* for the repeal of the letters patent, see *ib.* p. 264.

modern
times.

Parliament was called on to make and the Courts to construe statutory powers and provisions the like of which had seldom if ever been made or construed in earlier times ; and so many new points arose for legislative precaution and judicial discussion, and it took so much time and labour to disentangle them, that it never occurred to anybody to think that the Common Law could have anything of importance to say to the matter. Indeed, to speak plainly, it is clear enough that Parliament had forgotten all about the *Sutton's Hospital* case, and perhaps it is not surprising that the Courts did not remember it.

Colman v.
E. C. Ry.
Co. and
other cases
in equity.

In *Colman v. E. C. Ry. Co.* the suit was by a shareholder to restrain the company and its directors from applying its funds in promoting a steam-packet company in connexion with the railway. Injunction granted. Lord Langdale in the course of his judgment spoke of the exercise of a railway company's powers as a matter affecting public rights and interests, and therefore to be looked into with more vigilance than the conduct of an ordinary partnership, and observed how desirable it was that the property of railway companies should be secure from being pledged to unauthorized speculations, so that investment in them might be prudent [γ]. He further expressed his clear opinion "that the powers which are given by an Act of Parliament, like that now in question, extend no farther than is expressly stated in the Act, or is necessarily and properly required for carrying into effect the undertaking and works which the Act has expressly sanctioned. . . . They [the company] have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the Act of Parliament, but they have no power of doing anything beyond it."

Salomons v. Laing, 12 Beav. 339, also before Lord Langdale, was a suit by a shareholder to restrain the London, Brighton, and South Coast Ry. Co., which was already lawfully possessed of many shares in the Direct London and Portsmouth Co., from taking up more shares in that company and otherwise assisting it out of the South Coast Co.'s funds. The M.R. said : "A railway company incorporated by Act of Parliament is bound to apply all the moneys and property of the company for the purposes directed and provided for by the Act, and for no other purpose whatever." He went on to say that any surplus after the purposes of the Act are fulfilled belongs to the shareholders as dividend and cannot be disposed of against the will of any shareholder [β]. "Any application of or dealing with . . . any funds or money of the company . . . in any manner not distinctly authorized by the Act, is in my opinion an illegal application or dealing" (p. 352). In a later stage of the case (pp. 377,

382) he spoke of the arrangement between the two companies as "fraud against the legislature, who gave them their powers for purposes entirely different" [γ]. The case of *Cohen v. Wilkinson* (12 Beav. 125, 138, 1 Mac. & G. 481), which arose out of the same series of transactions, decided that a railway company is bound not only to make nothing different from what Parliament intended it to make, but to make nothing less than the whole: abandoning a material part of the scheme is in fact equivalent to substituting a different scheme (cp. *Hodgson v. Earl of Powis*, 1 D. M. G. 6).

In *Bugshaw v. East Union Ry. Co.* (7 Ha. 114) it was laid down that capital raised under an Act of Parliament for a specific purpose defined by the Act cannot be applied by directors (and probably not by the unanimous assent of the shareholders) to any other purpose than such as the company's general funds might be applied to [γ]: in the Court of Appeal (2 Mac. & G. 389) the case was put more on the ground of the individual shareholder's right to have his money applied only to the specific purpose for which he advanced it [β].

In the subsequent cases of *Beman v. Rufford*, 1 Sim. N. S. 550 (Lord Cranworth, V.-C.) and *G. N. Railway Co. v. E. C. Railway Co.*, 9 Ha. 306 (Turner, V.-C.), the point is that the statutory incorporation of a railway company imposes on it, with reference to the interests of the public [γ], a positive duty of maintaining and working its line, and it must not enter into any agreement that amounts to a delegation or abandonment of this duty (α); in *Beman v. Rufford*, however, the strong expression occurs that, "on the principle that has been so often laid down, this Court will not tolerate that parties having the enormous powers which railway companies obtain [γ] should apply one farthing of their funds in a way which differs in the slightest degree from that in which the legislature has provided that they shall be applied" (p. 565). The remarks of the Lord Justice Turner in the later case of *Shrewsbury & Birmingham Ry. Co. v. L. & N. W. Ry. Co.*, 4 D. M. G. 115, 132 are less strong; in *Simpson v. Westminster Palace Hotel Co.*, 2 D. F. J. 141, a dissenting shareholders' suit, he seems to confine himself to the power of a meeting to bind the minority on partnership principles [β].

We have dwelt so far on these decisions in this place (though one or two of them do not even in their language really postulate the doctrine of limited special capacities) because they had much weight in *East Anglian Railways Co. v. E. C. Railway Co.*, 11 C. B. 775, 21 L. J. C. P. 23, which for some time was treated as a leading case, and was the chief obstacle to the restoration of the common law

East Anglian Railways case, &c., at common law

(α) As a lease of the undertaking, and control of the line to another or grant of *exclusive* running powers company.

doctrine of "general capacity." That was in effect the case of an agreement by one railway company to promote the undertaking of another. The Court said: "It is clear that the Defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the Act, and that their funds can only be applied for the purposes directed and provided for by the statute." (Nor does it matter that an application of funds not authorized by the Act is expected to be for the profit of the line.) "They are a corporation only for the purpose of making and maintaining the Eastern Counties Railway. Every proprietor when he takes shares has a right to expect that the conditions upon which the Act was obtained will be performed . . . the public also has an interest in the proper administration of the powers conferred by the Act [γ]. . . . If the company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract [β], though it may make them all personally liable to perform their contract, would not bind them in their corporate capacity or render liable their corporate funds." This was followed by *Macgregor v. Dover and Deal Railway Co.* (in Ex. Ch.) 18 Q. B. 618, 22 L. J. Q. B. 69. The plaintiff in error, the Chairman of the South Eastern Railway Co. had undertaken that his company should guarantee certain parliamentary expenses of the Dover and Deal Company. Held, on the authority of the last case, that the agreement was void as an attempt to bind the S. E. Company to do an act which to the knowledge of both parties would be illegal; "not merely an act which they have no power to do, but an act contrary to public policy and the provisions of a public Act of Parliament" [γ].

In *Hart v. Eastern Union Ry. Co.*, 7 Ex. 246, 21 L. J. Ex. 97, in Ex. Ch. 8 Ex. 116, 22 L. J. Ex. 20, it was even contended, but without success, that when a company was empowered by its Act to borrow money on debentures, there was no right of action on such debentures because the Act had no words expressly giving it, and provided another special remedy in certain events. Cp. *Slurk v. Highgate Archway Co.*, 5 Taunt. 792.

Reaction
in South
Yorkshire,
&c. Co. v.
G. N. R.
Co. Judg-
ment of
Parke, B.

But this doctrine did not long pass unquestioned. The theory of general capacity was upheld in *S. Yorkshire Ry. & River Dun Co. v. G. N. Ry. Co.*, 9 Ex. 55, 22 L. J. Ex. 305. The action was on an agreement that the defendant company should have the use of the plaintiff company's line for carrying coal for 21 years, paying tolls on a scheme framed to secure to the plaintiff company a dividend varying with the quantity of coal carried. The defendant company pleaded that the agreement was unauthorized and void. The arguments turned a good deal on the question whether these payments were such "tolls"

as contemplated by the Railways Clauses Consolidation Act, and on that ground the decision in favour of the agreement was affirmed in the Exchequer Chamber (9 Ex. 642), nothing being said on the general doctrine. In the Court below Parke, B., afterwards Lord Wensleydale, expressed his opinion that as a corporation the defendants had power to do all things connected with the management of the concern unless prohibited by the Act of Parliament (9 Ex. 67) and that the contract was *prima facie* binding, and must be enforced if it could not be made out that it was forbidden by the Act (9 Ex. 88, 22 L. J. Ex. 315). The classical passage of his judgment, as it may now fairly be called, is as follows :

“Generally speaking, all corporations are bound by a covenant under their corporate seal properly affixed, which is a legal mode of expressing the will of the entire body, and are bound as much as an individual is by his deed. Contracts with partnerships stand upon a different footing. They relate to the power of one member of a partnership to bind another, and constitute a branch of the law of principal and agent. In partnerships, where all the members do not concur in a contract (as often they do not) one partner may bind the other in all contracts within the scope of their ordinary partnership dealings. In those beyond, the individual partners making the contract are bound, not the other partners. But corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which all concurred. But where a corporation is created by an Act of Parliament for particular purposes with special powers, then indeed another question arises. Their deed, though under their corporate seal, and that regularly affixed, does not bind them if it appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that this deed was *ultra vires*—that is, that the legislature meant that such a deed should not be made.”

This is adopted by Blackburn, J., in his judgment in *Taylor v. His view* *Chichester & Midhurst Railway Co.*, L. R. 2 Ex. 356, 383. In the *adopted in* Exchequer Chamber Blackburn and Willes, JJ., were a dissenting *subsequent* minority : the decision of the majority was reversed in the House of *cases.* Lords, L. R. 4 H. L. 628, but on the ground that the agreement then in question was clearly within the company's ordinary and proper business, so that no shareholder could have objected to the directors entering into it, and thus the more general question was left at large. The judgments of the dissenting judges below remain entitled to considerable weight : and, at all events, in the words of Blackburn, J., “Lord Wensleydale's mode of stating the proposition has been

adopted as expressing the true doctrine, by the Court of Queen's Bench in *Chambers v. Manchester & Milford Railway Co.*, 5 B. & S. 588 ; 33 L. J., Q. B. 268 ; by the Court of Common Pleas in *South Wales Railway Co. v. Redmond*, 10 C. B. N. S. 675 [see per Erle, C. J., at p. 682] ; by the Court of Exchequer in *Bateman v. Mayor, &c., of Ashton-under-Lyne*, 3 H. & N. 323 ; 27 L. J., Ex. 458 [where, however, one member of the court could not get over the East Anglian case, though personally not approving it] ; by Lord Cranworth, C., in delivering the judgment in the House of Lords in *Shrewsbury & Birmingham Railway Co. v. N. W. Railway Co.*, 6 H. L. 113."

Lord Cranworth's remarks must be specially cited.

State-
ments
of the law
to same
effect in
House of
Lords.

"*Prima facie* corporate bodies are bound by all contracts under their common seal. When the Legislature constitutes a corporation it gives to that body *prima facie* an absolute right of contracting. But this *prima facie* right does not exist in any case where the contract is one which, from the nature and object of the incorporation, the corporate body is expressly or impliedly prohibited from making ; such a contract is said to be *ultra vires* (a). And the question here, as in similar cases, is whether there is anything on the face of the act of incorporation which expressly or impliedly forbids the making of the contract sought to be enforced" (p. 135).

The actual ground of decision was that in this case, whether the contract was valid or not, the time had not arrived at which it was to take effect.

Moreover Lord Wensleydale was enabled to repeat his opinion even more distinctly in the House of Lords : *Scottish N. E. Railway Co. v. Stewart*, 3 Macq. 382, 415 (and see per Willes, J., L. R. 2 Ex. 390-1).

"There can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England and without it in Scotland, except when the statutes by which it is created or regulated expressly or by necessary implication prohibit such contract between the parties. *Prima facie* all its contracts are valid, and it lies on those who impeach any contract to make out that it is avoided."

Lord St. Leonards took the same view in *E. C. Ry. Co. v. Hawkes* in the Court of Chancery (see 1 D. M. G. 737, 752, 759-60), and still more clearly in the House of Lords (5 H. L. C. 331).

"The appellants as a corporation have all the powers incident to

(a) This term, if restricted to the definition here given of it, is harmless and possibly convenient ; but it

has become so ambiguous by less accurate usage that we prefer to avoid it.

a corporation except so far as they are restrained by their act of incorporation. Directors cannot act in opposition to the purpose for which their company was incorporated [γ], but short of that they may bind the body just as [the proper officers, &c., of] corporations in general may do" (p. 373). Again, "the safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds" (p. 371). He further stated the effect of this and other shortly preceding decisions of the House of Lords (which however do not much illustrate our particular subject), as being to "place the powers and liabilities of directors and their companies in making contracts and in dealing with third parties upon a safe and rational footing. They do not authorize directors to bind their companies by contracts foreign to the purposes for which they were established, but they do hold companies bound by contracts duly entered into by their directors for purposes which they have treated as within the objects of their Acts, and which cannot clearly be shown not to fall within them" (p. 381, and see L. R. 9 Ex. 389). This case is the more important inasmuch as it was one of specific performance of a contract to purchase land and pay a sum of money as compensation and damages, and the contract was enforced notwithstanding that in the result the land was not wanted by the company.

The doctrine was also discussed by Erle, J., in *Mayor of Norwich v. Norfolk Ry. Co.*, 4 E. & B. 397, 24 L. J. Q. B. 105 (a case where there was an extraordinary division of opinion in the Court on the questions actually before them, and especially whether the particular contract was or was not unlawful *in itself*). He thought the true view to be that corporations were prohibited by implication only from using their parliamentary powers in order to defeat the purposes of incorporation, and criticized the judgment in the *East Anglian* case as too wide (4 E. & B. 415, 24 L. J. Q. B. 112): and he carefully pointed out the danger of overlooking the differences between a dissenting shareholder's suit in equity and an action by a stranger against the corporate body (4 E. & B. 419, 24 L. J. Q. B. 113). The same learned judge further said in *Bostock v. N. Staffordshire Ry. Co.*, 4 E. & B. 798, 819, 24 L. J. Q. B. 225, 231, (this however was not a case of contract), citing in the *Sutton's Hospital* case, "By common law the creation of a corporation conferred on it all the rights and liabilities in respect of property, contracts, and litigation, which existence confers on a natural subject, modified only by the formalities required for expressing the will of a numerous body. . . . Those of its rights and liabilities which are unaffected by statute exist as at common law."

Opinion of
Erle, J.

Turning to recent cases in courts of equity, we find marked signs of an abandonment of their earlier view, and adherence to the doctrine

Recent
cases in
equity.

of general capacity. In considering the power of building societies (which were statutory quasi-corporations ; see now the Act of 1874, 37 & 38 Vict., c. 42), to borrow money, the question has been treated on all hands as being not whether the borrowing of money was expressly or necessarily permitted by the statute, but whether it was forbidden or clearly repugnant to the constitution and objects of the society : *Laing v. Reed*, 5 Ch. 4 ; *Ex parte Williamson*, *ib.* 309 (notwithstanding the wording of the head-note in the latter case, see p. 312).

And in *Ex parte Birmingham Banking Co.*, 6 Ch. 83, the Court of Appeal held without hesitation that an incorporated company can *prima facie* mortgage any part of its property, and this as well for an existing debt as for a new loan. The articles of association authorized borrowing on mortgage, but the Lords Justices did not stop to discuss whether this would or would not include a mortgage to secure pre-existing debts (*a*), resting this part of their decision on the general power of a body corporate to "hold property and dispose of it as freely as an individual, unless it is specially prohibited from so doing" (James, L. J., at p. 87). One may also refer to the view taken by Turner, L. J., that the affirmative provisions of the Companies Clauses Act do not exclude other modes of contracting : *Wilson v. West Hartlepool Ry. Co.*, 2 D. J. S. 475, 496.

Riche v. Ashbury, &c., Co. in Ex. Ch.

Lastly, we have the doctrine of general capacity deliberately adopted by the whole Court of Exchequer Chamber in *Riche v. Ashbury Ry. Carriage Co.*, L. R. 9 Ex. 254, *sqq.* The division of the Court was confined to the questions (i) whether a company formed under the Companies Act, 1862, is *forbidden* to undertake business substantially beyond its objects as defined in the memorandum of association and (ii) whether, apart from this, an assent of all the shareholders could in this case be inferred in fact. The decision of the House of Lords (L. R. 7 H. L. 653) disposes of these questions without touching the general doctrine.

Application of doctrines of partnership and agency.

Applica-
tion of
partner-
ship law:
Simpson v. Denison.

A case in which this view appears most clearly, and indeed exclusively, is *Simpson v. Denison*, 10 Ha. 51. The suit was instituted by dissentient shareholders to restrain the carrying out of an agreement between their company (the Great Northern) and another railway company, by which the Great Northern was to take over the whole of that company's traffic, and also to restrain the application of the funds of the Great Northern Company for obtaining an Act of Parliament to ratify such agreement. The V.-C. Turner treated it as a pure question of partnership : "How would this case have stood" he

(*a*) As to which see *Inns of Court Hotel Co.*, 6 Eq. 82.

says in the first paragraph of the judgment "if it had been the case of an ordinary limited partnership!" The Railways Clauses Consolidation Act became in this view a statutory form of partnership articles, to which every shareholder must be taken to have assented: and the general ground of the decision was that "no majority can authorize an application of partnership funds to a purpose not warranted by the partnership contract." For the purpose of the case before the Court this analogy was perfectly legitimate; and the dissent expressed by Parke, B. (in *South Yorkshire, &c. Co. v. G. N. R. Co.* 9 Ex. 88, 22 L. J. Ex. 315), must be considered only as a warning against an unqualified extension of it to questions between the corporate body and strangers. The rule comes out, if possible, even more clearly in *Pickering v. Stephenson*, 14 Eq. 322, 340, where it is thus set forth by Wickens, V.-C. "The principle of jurisprudence which I am asked here to apply is that the governing body of a corporation that is in fact a trading partnership cannot in general use the funds of the community for any purpose other than those for which they were contributed. By the governing body I do not of course mean exclusively either directors or a general council (a), but the ultimate authority within the society itself, which would ordinarily be a majority at a general meeting. According to the principle in question the special powers given either to the directors or to a majority by the statutes or other constituent documents of the association, however absolute in terms, are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association."

Statement
of the prin-
ciple in
Pickering
v. Stephen-
son.

It is to be observed that this passage contains no indication of opinion on the extent to which a corporation may be bound by the unanimous assent of its members.

Any dissenting shareholder may call for the assistance of the Court to restrain unconstitutional acts of the governing body, but he must do so in his proper capacity and interest as a shareholder and partner. If the Court can see that in fact he represents some other interest, and has no real interest of his own in the action, it will not listen to him; as when the proceedings are taken by the direction of a rival company in whose hands the nominal plaintiff is a mere puppet, and which indemnifies him against costs: *Forrest v. Manchester, &c., Ry. Co.*, 4 D. F. J. 126: so where the suit was in fact instituted by the plaintiff's solicitor on grounds of personal hostility, *Robson v. Dodds*, 8 Eq. 301. But if he has any real interest and is proceeding at his own risk he is not disqualified from suing by the fact

Rights of
dissenting
share-
holders.

(a) Referring to the peculiar constitution of the company then in question.

Parties to
action.

that he has collateral motives, or is acting on the suggestion of strangers or enemies to the company, or even has acquired his interest for the purpose of instituting the suit : *Colman v. E. C. Ry. Co. supra* ; *Seaton v. Grant*, 2 Ch. 459 ; *Bloxam v. Metrop. Ry. Co.*, 3 Ch. 337. As a rule the plaintiff in actions of this kind sues on behalf of himself and all other shareholders whose interests are identical with his own ; but there seems to be no reason why he should not sue alone in those cases where the act complained of cannot be ratified at all, or can be ratified only by the unanimous assent of the shareholders ; *Hoole v. G. W. Ry. Co.*, 3 Ch. 262. There is another class of cases in which abuse of corporate powers or authorities is complained of, but the particular act is within the competence of, and may be affirmed or disaffirmed by "the ultimate authority within the society itself" (in the words of Wickens, V.-C., just now cited), and therefore the corporation itself is *prima facie* the proper plaintiff. See Lindley 2. 935 sqq. *Gray v. Lewis*, 8 Ch. 1035, 1051 ; *MacDougall v. Gardiner*, 10 Ch. 606, 1 Ch. D. 13, 21 ; *Russell v. Wakefield Waterworks Co.*, 20 Eq. 474. "The majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly" (a). The exception is when a majority have got the government of the corporation into their own hands, and are using the corporate name and powers to make a profit for themselves at the expense of the minority ; then an action is rightly brought by a shareholder on behalf of himself and others, making the company a defendant : *Menier v. Hooper's Telegraph Works*, 9 Ch. 350. We mention these cases only to distinguish them from those with which we are now concerned.

Limited
agency of
directors,
&c.

The cases in which companies and their directors have been restrained by injunction at the suit of shareholders from unwarranted or (as we have already taken leave to call them) unconstitutional proceedings, are collected and digested by Mr. Justice Lindley in a passage (2. 1059) to which the reader is referred for detailed information. With regard to the doctrine of limited agency, and to its peculiar importance in the case of companies constituted by public documents, all persons dealing with them being considered to know the contents of those documents and the limits set to the agent's authority by them, this subject again is so completely dealt with by Mr. Justice Lindley (b) that we need not dwell on it at any length. It may be useful to give Lord Hatherley's concise statement of the law (when V.-C.) in *Fountaine v. Carmarthen Ry. Co.*, 5 Eq. 316, 322.

"In the case of a registered joint-stock company all the world of

(a) Mellish, L. J., 1 Ch. D. at p. 25. As to a shareholder's right to use the company's name as plaintiff,

see *Pender v. Lushington*, 6 Ch. D. 70 ; *Duckett v. Gover, ib.*, 82. (b) 1. 266—272, 351.

course have notice of the general Act of Parliament and of the special deed which has been registered pursuant to the provisions of the Act, and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the directors must see that those limited powers are not being exceeded. If, on the other hand, as in the case of *Royal British Bank v. Turquand* (a) the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do. That is the result of Lord Campbell's judgment in *Royal British Bank v. Turquand*."

The contrast of the two classes of cases is well shown in *Royal British Bank v. Turquand* (*supra*) and *Balfour v. Ernest*, 5 C. B. N. S. 601, 28 L. J. C. P. 170. In the former case there was power for the directors to borrow money if authorized by resolution : and it was held that a creditor taking a bond from the directors under the company's seal was not bound to inquire whether there had been a resolution. Jervis, C. J., said in the Exchequer Chamber (the rest of the Court concurring) :—

"We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here on reading the deed of settlement would find not a prohibition from borrowing, but a permission to do so on certain conditions."

The same principle has been followed in many later cases (*Ex parte Eagle Insurance Co.*, 4 K. & J. 549, 27 L. J. Ch. 829 ; *Campbell's ca. &c.* 9 Ch. 1, 24 ; *Totterdell v. Fareham Brick Co.*, L. R. 1 C. P. 674 ; *Re County Life Assce. Co.*, 5 Ch. 288, a very strong case, for the persons who issued the policy were assuming to carry on business as directors of the company without any authority at all) and it has been decisively affirmed by the House of Lords in *Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869. In that case a bank had honoured cheques drawn by persons acting as directors of the company, but who had never been properly appointed ; and these payments were held to be good as against the liquidator, the dealings having been on the face of them regular, and with *de facto* officers of the company. Shareholders who allow persons to assume office and conduct the company's business are, as against innocent third persons,

(a) 5 E. & B. 248, 6 *ibid.* 327 ; 24 L. J. Q. B. 327, 25 *ibid.* 327.

no less bound by the acts of these *de facto* officers than if they had been duly appointed. It is for the shareholders to see that unauthorized persons do not usurp office and that the business is properly done (a).

In *Balfour v. Ernest* the action was on a bill given by directors of an insurance company for a claim under a policy of another company, the two companies having arranged an amalgamation; this attempted amalgamation however had been judicially determined to be void: *Ernest v. Nicholls*, 6 H. L. C. 401, revg. S. C. nom. *Port of London Co.'s case*, 5 D. M. G. 465. The directors had power by the deed of settlement to borrow money for the objects and business of the company and to pay claims on policies granted by the company, and they had a power to make and accept bills &c. which was not restricted in terms as to the objects for which it might be exercised. It was held that, taking this with the other provisions of the deed, they could bind the company by bills of exchange only for its ordinary purposes, and not in pursuance of a void scheme of amalgamation, that the plaintiffs must be taken to have known of their want of authority, which might have been ascertained from the deed, and that they therefore could not recover. "This bill is drawn by procuration" said Willes, J., "and unless there was authority to draw it the company are not liable (b) . . . this is the bare case of one taking a bill from Company A. in respect of a debt due from Company B., there being nothing in the deed (which must be taken to have been known to the plaintiffs) to confer upon the directors authority to make it."

The connexion with ordinary partnership law is brought out in the introductory part of Lord Wensleydale's remarks in *Ernest v. Nicholls* (6 H. L. C. 401, 417):—

"The law in ordinary partnerships, so far as relates to the powers of one partner to bind the others, is a branch of the law of principal and agent. Each member of a complete partnership is liable for himself, and as agent for the rest binds them, upon all contracts made in the course of the ordinary scope of the partnership business.

. . . Any restriction upon the authority of each partner, imposed by mutual agreement among themselves, could not affect third persons, unless such persons had notice of them; then they could take nothing by contract [sc. as against the firm] which those restrictions forbade. [The law in this form, i.e., the presumption of every partner being the agent of the firm, being obviously inapplicable to joint-stock companies], the legislature then devised the

(a) Opinion of judges, at p. 880; per Lord Hatherley, at pp. 897-8.

(b) In form it was a bill drawn

by two directors on the company's cashier, and sealed with the company's seal.

plan of incorporating these companies in a manner unknown to the common law, with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorized to bind all the shareholders by requiring the co-partnership deed to be registered . . . and made accessible to all." The continuation of the passage is given by Mr. Justice Lindley (1.266); its language is however extra-judicial and of an almost dangerous latitude, and the Courts have distinctly declined to adopt it (*Agar v. Athenæum Life Asse. Soc.*, 3 C. B. N. S. 725, 27 L. J. C. P. 95, *Prince of Wales Asse. Co. v. Harding*, E. B. & E. 183, 27 L. J. Q. B. 297). In fact they could not have done so without disregarding *Royal British Bank v. Turquand*.

We now pass on to the cases which show how far transactions in the conduct of a company's affairs which in their inception were invalid as against any dissenting shareholder may nevertheless be made binding on the partnership and decisive of its collective rights (at all events as between the company and its own past or present members) by the subsequent assent of all the shareholders, though such assent be informal and shown only by acquiescence. The leading examples on this head are given by the well-known cases in the House of Lords which arose in the winding-up of the Agriculturists' Cattle Insurance Company.

Ratification of irregular transactions by assent of all the shareholders. *Spackman v. Evans, &c.*, considered.

They have been relied on as authorities for the proposition that the unanimous assent of shareholders may bind a company in its corporate capacity to anything : but since the decision of the House of Lords in *Ashbury Ry. Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653, this view is untenable. "In no one of those cases," observed Lord Cairns, "was there any question as to whether the power of the whole company had been exceeded" (L. R. 7 H. L. 674). The whole matter was one of the internal constitution and affairs of the company, and there was no occasion to consider to what extent or in what transactions the assent of shareholders was capable of binding the company as against strangers. Moreover, the irregular act which was ratified was unauthorized as to the manner and form of it, but belonged to an authorized class, as pointed out by Lord Romilly (L. R. 3 H. L. 244—5) (a). The general nature of the facts was thus : At a meeting of the company an arrangement was agreed to, afterwards called the Chippenham arrangement, by which shareholders who elected to do so within a certain time might retire from the company on specified terms by a nominal forfeiture of their shares. The deed of settlement contained provisions for forfeiture of shares, but not such as to warrant this arrangement. It was held—

(a) See also the judgment of *Ry. Carriage Co.*, L. R. 9 Ex. 289. Archibald, J., in *Riche v. Ashbury*

In *Evans v. Smallcombe*, L. R. 3 H. L. 249, that the Chippenham arrangement could be supported [sc., as having become part of the internal regulations of the company] only by the assent of all the shareholders, but that in fact there was knowledge and acquiescence sufficiently proving such assent. A shareholder who had retired on the terms of the Chippenham arrangement was therefore not liable to be put on the list of contributories. (Cp. *Brotherhood's ca.* 4 D. F. J. 566, an earlier and similar decision in the same winding-up)

In *Spackman v. Evans, ib.*, 171, that a later and distinct compromise made with a smaller number of dissentient shareholders had not in fact been communicated to all the shareholders as distinct from the Chippenham arrangement, and could not be deemed to have been ratified by that acquiescence which ratified the Chippenham arrangement; and that a shareholder who had retired under this later compromise was therefore rightly made a contributory.

In *Houldsworth v. Evans, ib.*, 263, that time was of the essence of the Chippenham arrangement, so that when a shareholder was allowed to retire on the terms of the Chippenham arrangement after the date fixed for members to make their election, this, in fact, amounted to a distinct and special compromise which ought to have been specially communicated to all the shareholders: this case therefore followed *Spackman v. Evans (a)*. Cp. *Stewart's ca.* 1 Ch. 511.

The question of the shareholders' knowledge or assent in each case involved delicate and difficult inferences of fact, and on these the opinions of the Lords who took part in the decisions were seriously divided. It may perhaps also be admitted that on some inferences of mixed fact and law there was a real difference; but it may safely be affirmed that on any pure question of law there was none (b). These cases appear to establish in substance the following propositions: (1). For the purpose of binding a company as against its own shareholders, irregular transactions of an authorized class may be ratified by the assent of all the individual shareholders. (2). Such assent must be proved as a fact. Acquiescence with knowledge or full means of knowledge may amount to proof of assent, and lapse of time though not conclusive is material. The converse proposition that the assent of a particular shareholder will bind him to an irregular transaction as against the company is likewise well established, but does not fall within our present scope. See *Campbell's ca. &c.*, 9 Ch. 1.

Phosphate of Lime Co. v. Green. The later case of *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43 was of much the same kind though in a different form. The action

(a) A more detailed account is given in Lindley on Ptnp. 1. 763. See also L. R. 7 C. P. 51-2, and note

the remark of Willes, J., p. 53.

(b) See per Willes, J., L. R. 7 C. P. 60.

was by the company against past shareholders for a debt, and the defence rested on an accord and satisfaction which had been effected by an irregular forfeiture of the defendant's shares, and which in the result was upheld on the ground of the shareholders' acquiescence. There is nothing to throw any light on the question whether in the case of a trading company formed under the Companies Act 1862, there is any class of acts which not even the unanimous assent of shareholders can ratify : it was not necessary to consider the existence of such a distinction, nor was it brought to the attention of the Court. Note that the difficulty as to inferences of fact was much less than in the cases before the House of Lords, as the Court had to say, not whether there had been acquiescence, but whether there was evidence from which a jury might reasonably have found acquiescence (see pp. 61-62) (a).

It is not contended, however, that these authorities have no application except in closely similar cases of arrangements relating to the internal affairs of companies, but only that in themselves they do not decide more than we have stated, and leave it open how far their application is to be extended. There seems to be no reason why the same principle should not apply to dealings between the corporation and strangers, except so far as it is controlled by positive corporate disabilities imposed by the policy of the legislature.

Doctrine of public policy.

In *E. C. Ry. Co. v. Hawkes*, 5 H. L. C. 331, Lord Cranworth, who as we have seen was a decided upholder of the *prima facie* unlimited capacity of corporations, after citing *Colman v. E. C. Ry. Co.*, *Salomons v. Laing*, *Bagshaw E. Union Ry. Co.* (see above p. 100, 101), expressed himself as follows :—"It must be now considered as a well settled doctrine that a company incorporated by Act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application may appear to be." In this case the disputed contract was held good, and the distinction was pointed out between an act which is forbidden or illegal in itself, e.g., obstructing a navigable river by building a bridge across it as in *Mayor of Norwich v. Norfolk Ry. Co.* 4 E. & B. 397, and an act which is merely unauthorized as between directors and shareholders. A pretty full account of this case is given in the judgment of Blackburn, J., in *Taylor v. Chichester & Midhurst Ry. Co.*, L. R. 2 Ex. 356, 386—9 ; and the effect of the doctrine of public policy in imposing restrictions on corporate action which are

Public
Policy.
*E. C. R. v.
Hawkes.*

*Taylor v.
Chichester
& Co.*

(a) See further on the subject of ratification by companies, Lindley 1. 273-7.

beyond and independent of the rights of individual shareholders, and which therefore their assent is powerless to remove, is explained in a subsequent passage of the same judgment, which points out that in incorporating a company the legislature has two distinct purposes, the convenience of the shareholders and the benefit of the public. Every shareholder has rights against the corporation analogous to those of partners between themselves, and may object to unauthorized acts being done. These individual rights however may be waived. But if the legislature actually forbids the company to enter upon certain transactions, then no assent will make such transactions binding. Whether such a prohibition exists depends in each case on the construction of the statute (pp. 378—9).

Ashbury
Ry. Car-
riage Co.
v. Riche.
Policy of
Companies
Act.

How far the Court should be guided in the construction of such statutes by the consideration of the general policy of such legislation is a question on which there has been much difference of opinion.

We have already referred shortly to *Ashbury Ry. Carriage Co. v. Riche*. In this case the distinct question arose (for the first time it is believed), whether the Companies Act 1862 does or does not forbid a company formed under it to bind itself by contract to an undertaking beyond the purposes specified in the memorandum of association. The 12th section of the Act says that a company shall not alter its memorandum of association except in certain particulars as to capital and shares (a); the Exchequer Chamber was equally divided as to the effect of this. Blackburn, Brett and Grove, JJ. were of opinion that it did not amount to making companies incapable of binding themselves to anything beyond the scope of the memorandum; Archibald, Keating and Quain, JJ. held that it did. They thought it to be "the policy as well as the true construction" of the Act "to ignore (so to speak) the existence of the corporation and the power of the shareholders, even when unanimous, to contract or act in its name for any purpose substantially beyond or in excess of its objects as defined by the memorandum of association" (p. 291). Admitting that a corporation has *prima facie* as incident at Common Law the large powers laid down in the *Sutton's Hospital* case, 10 Co. Rep. 30 b, and citing the statement of the law by Lord Cranworth in *Shrewsbury and Birmingham Ry. Co. v. N. W. Ry. Co.* (given above, p. 104) the judgment of Archibald, J. (L. R. 9 Ex. pp. 292-3) proceeds to say that "the presumption of a *prima facie* general authority to contract" is rebutted by the "express provision that the scope and objects of the company as originally declared by its memorandum of association shall be unchangeable." The corporation may be regarded

(a) Extended by the Act of 1867, matters of the like sort,
ss. 9, sqq., 21, but only to other

as non-existent for the purpose of contracts beyond these objects ; and if so, the individual assents of all the shareholders cannot give the ideal legal body of the corporation a capacity of which the legislature has deprived it, so as to render an agreement substantially beyond the defined objects " a contract of the ideal legal body, which exists only as a corporation, and with powers and capacity which are thus admittedly exceeded."

This opinion was confirmed by the unanimous decision of the House of Lords, L. R. 7 H. L. 653, which proceeds not so much on any one section as on the intention of the Act appearing from its various provisions taken as a whole. The existence and competence of the company are limited by the memorandum of association, which is "as it were the area beyond which the action of the company cannot go" (Lord Cairns, at p. 671). Precisely analogous questions are not likely to arise very often (a), but the decision lays down with sufficient clearness the lines that must henceforth be followed in the treatment of the law.

It is not proposed to enter on any further discussion of the particular contracts which particular corporate bodies have been held incapable of making. One class of contracts, however, is in a somewhat peculiar position in this respect, and requires a little separate consideration. We mean the contracts expressed in negotiable instruments and governed by the law merchant. It is said and truly said that as a general rule a corporation cannot bind itself by a negotiable instrument. The origin and meaning of the rule are easily misapprehended. At first sight it looks like an obvious deduction from the doctrine of limited special capacities. If a corporation can only make such contracts as it is empowered to make, then it follows of course that among other things it cannot issue bills or notes without express or implied authority to do so ; but we have seen that this ground is now hardly tenable. In order to state what we believe to be the true view we must to some extent anticipate the subject of the following chapter, so far as it relates to the form of corporate contracts. The general rule is that the contracts of a corporation must be made under its common seal, and it follows that a corporation cannot *prima facie* be bound by negotiable instruments in the ordinary form. The only early authority which is really much to the point was argued and partly decided on this footing (b).

Inability of corporations to make negotiable instruments.

The difficulty is partly formal

(a) See per Blackburn, J., L. R. 9 Ex. 271.

(b) *Broughton v. Manchester Waterworks Co.* 3 B. & Ald. 1. The chief

Partly in the non-applicability of the ordinary rules of partnership agency.

And partly in the peculiar

Of late years incorporated companies have issued documents under seal purporting to be negotiable; but by the law merchant an instrument under seal cannot be negotiable, and it is the better opinion that the fact of the seal being a corporate one makes no difference; it cannot be taken as merely equivalent to signature because the party sealing is an artificial person and unable to sign (*a*). Putting this last question aside, however, there are very many matters about which a corporation can contract without seal, and in particular in the case of a trading corporation all things naturally incident to the business it carries on. Why should not the agents who are authorized to contract on behalf of the company in the ordinary course of its business be competent to bind the company by their acceptances, &c., on its behalf just as a member of an ordinary trading partnership can bind the firm? There is a twofold answer to this question. First, the extensive implied authority of an ordinary partner to bind his fellows cannot be applied to the case of a numerous association, whether incorporated or not, whose members are personally unknown to each other, and it has been often decided that the managers of such associations cannot bind the individual members or the corporate body, as the case may be, by giving negotiable instruments in the name of the concern, unless the terms of their particular authority enable them to do so by express words or necessary implication (*b*). In the case of a corporation this authority must be sought in its constitution as set forth in its special Act, articles of association, or the like.

Secondly, the power of even a trading corporation to contract without seal is limited to things incidental to the usual conduct

point was on the statutes giving the Bank of England exclusive rights of issuing notes, &c., within certain limits, as to which see Lindley, l. 191, note. In *Murray v. E. India Co.* 5 B. & Ald. 204, the statutory authority to issue bills was not disputed; a difficulty was raised as to the proper remedy, but disposed of in the course of argument (p. 210). Other cases at first sight like these relate to the authority of particular agents to bind a corporate—or unincorporated—association irrespective of the theory of corporate liabilities. See the next note but one.

(*a*) *Crouch v. Crédit Foncier*, L.R.

8 Q. B. 374.

(*b*) As to unincorporated joint stock companies: *Neale v. Turton*, 4 Bing. 149, *Dickinson v. Valpy*, 10 B. & C. 128, *Bramah v. Roberts*, 3 Bing. N. C. 963, *Bult v. Morrel*, 12 A. & E. 745, *Brown v. Byers*, 16 M. & W. 252. As to incorporated companies: *Steele v. Harmer*, 14 M. & W. 831 (in Ex. Ch. 4 Ex. 1, not on this point), *Thompson v. Universal Salvage Co.* 1 Ex. 694, *Re Peruvian Rys. Co.* 2 Ch. 617; *op. Ex pte City Bank*, 3 Ch. 758, per Selwyn, L. J. The two last cases go rather far in the direction of implying such a power from general words.

of its business. But as was pointed out by a judge who was certainly not disposed to take a narrow view of corporate powers, a negotiable instrument is not merely evidence of a contract, but creates a new contract and a distinct cause of action, and "it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or not according as the consideration between the original parties was good or bad;" and it would be most inconvenient if one had in the case of a corporation to inquire "whether the consideration in respect of which the acceptance is given is sufficiently connected with the purposes for which the acceptors are incorporated" (a).

The result seems to be that a corporation cannot be bound by negotiable instruments except in one of the following cases:—

1. When the negotiation of bills and notes is itself one of the purposes for which the corporation exists—"within the very scope and object of their incorporation" (b)—as with the Bank of England and the East India Company, and (it is presumed) financial companies generally, and perhaps even all companies whose business wholly or chiefly consists in buying and selling (b).

2. When the instrument is accepted or made by an agent for the corporation whom its constitution empowers to accept bills, &c., on its behalf either by express words or by necessary implication.

The extent of these exceptions cannot be said to be very precisely defined, and in framing articles of association, &c., it is therefore desirable to insert express and clear provisions on this head.

In America the Supreme Court has lately decided that local authorities having the usual powers of administration and local taxation have not any implied power to issue negotiable securities which will be indisputable in the hands of a *bona fide* holder for value (c), and also (but not without dissent) that municipal corporations have no such power; "they are not trading cor-

(a) Per Erle, C. J., *Bateman v. R.* 1 C. P. 512; *Ex parte City Mid Wales Ry. Co.*, L. R. 1 C. P. 499, 509. *Bank*, 3 Ch. 758.

(b) Per Montague Smith, J., L. (c) *Police Jury v. Britton*, 15 Wallace 566, 572.

porations and ought not to become such" (a). It seems however that in American courts a power to borrow money is held to carry with it as an incident the power of issuing negotiable securities (b).

Estoppel
and part
perform-
ance apply
to corpora-
tions.

The common law doctrine of estoppel (c), and the kindred equitable doctrine of part performance (d), apply to corporations as well as to natural persons. Even when the corporate seal has been improperly affixed to a document by a person who has the custody of the seal for other purposes, the corporation may be bound by conduct on the part of its governing body which amounts to an estoppel or ratification, but it will not be bound by anything less (e). The principles applied in such cases are in truth independent of contract, and therefore no difficulty arises from the want of a contract under the corporate seal, or non-compliance with statutory forms. But it is conceived that no sort of estoppel, part performance, or ratification, can bind a corporation to a transaction which the legislature has in substance forbidden it to undertake, or made it incapable of undertaking.

(a) *The Mayor v. Ray*, 19 Wallace 466.

(b) *Police Jury v. Britton*, 15 Wallace 566.

(c) *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642.

(d) *Wilson v. West Hartlepool Ry. Co.*, 2 D. J. S. 475, 493, per Turner, L. J.; *Crook v. Corporation of Seaford*, 6 Ch. 551.

(e) *Bank of Ireland v. Evans' Charities*, 5 H. L. C. 389.

CHAPTER III.

FORM OF CONTRACT.

ACCORDING to the modern conception of contract, all agreements which satisfy certain conditions of a general kind are valid contracts and may be sued upon, in the absence of any special legislation forbidding particular contracts to be made or denying validity to them unless made with particular forms. This theory finds a concise and complete expression in s. 10 of the Indian Contract Act :

Contract of ancient and modern conceptions of contracts as giving rights of action.

“All agreements are contracts [*i.e.*, enforceable by law, s. 2, sub-s. *h.*] if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void ” (then follows a clause saving all formalities required in particular cases by the law of British India). So thoroughly has this conception established itself in recent times that, having made the presence of a consideration one of the general conditions of a valid contract, we are now accustomed to bring contracts under seal within the terms of the condition by saying that where a contract is under seal the consideration is presumed. Historically speaking, this is a transparent fiction. The doctrine of Consideration in its present general form is of comparatively modern origin even if we look to the history of English law alone. If we roughly put it halfway between ourselves and Bracton we shall probably be allowing it as much antiquity as it can fairly claim. The ancient reason why a deed could be sued upon lay not in a consideration in our present sense of the word being presumed from the solemnity of the transaction, but in the solemnity itself. The forms of sealing and delivery come down to us from a time

Ancient
law re-
gards only
formal
contracts.

when the general theory of the law started from a different or even opposite point to our own. The fundamental assumption of ancient law (when it has got so far as to recognize contract at all) is that the validity of a contract depends not upon the substance of the transaction but upon its form. The rule is that formal contracts only can be sued upon: the want of any part of the formalities is fatal, the fulfilment of them is conclusive (*a*). Not that we find this as an existing state of things at any traceable period of Roman or English law: considerable classes of informal contracts are excepted on various grounds which are practically reducible to "convenience amounting almost to necessity": a phrase which we here introduce by anticipation from the modern learning as to the informal contracts of corporations. When we come to that subject in a later part of this chapter, the reader will find that the law relating to the form of corporate contracts is still going through a process of struggling development not altogether unlike that which took place in earlier times with regard to the contracts of natural persons. Both in the Roman law as presented to us in the Digest and Institutes, and in the English law of the thirteenth, and even down to the latter part of the fifteenth century, the primitive doctrine that formal contracts alone give rise to actions is at the base of the whole learning of contracts. It is overlaid no doubt with a series of exceptions—which in the English system, so far as one can now judge, are decidedly narrower in statement and less important in practice than in the Roman—but the exceptions are not as yet connected by any recognized general principle.

Informal
contracts
actionable
only as
exceptions
in Roman
and old
English
law.

In England we find this theory expressed by Bracton in almost purely Roman language (*b*) which is substantially repeated in Fleta. How far the theory was directly borrowed, or how far it already existed as a genuine parallel development of English legal ideas with which the authorities of the civil law were found in great measure to coincide, may perhaps be doubtful (*c*). At any rate the correspondence is so close that some statement of

(*a*) Maine, *Ancient Law*, 313 sqq. (4th ed.)

(*b*) In Britton the substantial correspondence remains, but the details are much more modified to suit the real facts of English practice,

e.g. the verbal Stipulation all but disappears (Cap. De Dette, l. 156, ed. Nicholls.)

(*c*) See Güterbock, *Henr. de Bracton*, § 18, p. 107-8, where the parallel is accurately stated.

the Roman doctrine in its general effect is almost necessary to make its English counterpart intelligible (a).

Formal contracts (*legitimae conventiones*) gave a right of action irrespective of their subject-matter. In Justinian's time the only kind of formal contract in use was the Stipulation (b), or verbal contract by question and answer, the question being put by the creditor and answered by the debtor (as *Dari spondes? spondeo: Promittis? promitto: Facies? faciam*). Originally the question and answer had been accompanied by the symbolic transaction of *Nexum*, and there is reason to think that the Stipulation was at first confined to loans of money (c). But the *Nexum* was abolished, and the Stipulation (possibly after going through a stage in which there was a fictitious loan) remained as a formal contract capable of being applied to any kind of subject-matter at the pleasure of the parties (d). Its application was in course of time extended by the following steps. 1. The question and answer were not required to be in Latin (e). 2. An exact verbal correspondence between them was not necessary (f). 3. (which for our present purpose is the most important) an instrument in writing purporting to be the record of a Stipulation was treated as strong evidence of the Stipulation having actually taken place (g). (The notion sometimes met with that if a contract by verbal question and answer was good, a contract in writing must be good *a fortiori*, is of course a mere modern invention.)

The
Roman
doctrine.

(a) What follows is mostly abridged from Savigny, *Obl.* 2. 196 sqq. Sir H. Maine's account in his chapter on the Early History of Contract is in close agreement with Savigny's. Since the first edition of this book was published the derivation of the Stipulation from the *Nexum* has been contested with great ingenuity by Prof. Hunter (*Roman Law*, 364.)

(b) The *literarum obligatio* (Gai. 3. 128) was obsolete. What appears under that title in the Institutes (3. 21) is a general rule of evidence unconnected with the ancient usage.

(c) Sav. *Syst.* 5. 582-40.

(d) In a modern English book

which has gone through several editions we find the astonishing statement that the Stipulation "was entered into before a magistrate or public officer through the medium of interrogatories and answers (*sic*) calculated to explain the nature and extent of the undertaking." The identification of a deed with *literarum obligatio* (Co. *Lit.* 171b) is nothing to this.

(e) Gai. 3. 93, I. 3. 15. de v.o. § 1.

(f) C. 8. 38. de cont. et comm. stipul. 10.

(g) C. 8. 38. de cont. et comm. stipul. 14, I. 3. 19. de inut. stipul. § 12.

*Nudum
pactum and
causa.*

Informal agreements (*pacta*) did not give any right of action without the presence of something more than the mere fact of the agreement. This something more was called *causa*. Practically the term covers a somewhat wider ground than our "consideration executed:" but it has no general notion corresponding to it, at least none co-extensive with the notion of contract; it is simply the mark, whatever that may be in the particular case, which distinguishes any particular class of agreements from the common herd of *pacta* and makes them actionable. Informal agreements not coming within any of the privileged classes were called *nuda pacta* and could not be sued on (*a*).

The further application of this metaphor by speaking of the *causa* when it exists as the clothing or vesture of the agreement is without classical authority but very common: it is adopted to the full extent by our own early writers (*b*). The metaphor is in itself natural enough, and not confined to legal usage: in the late Sir H. Holland's posthumous essays we read of "a naked inference now clothed with a positive cause" by the discoveries of spectrum analysis.

The term *nudum pactum* is sometimes used, however, with a special and rather different meaning, to express the rule of the civil law that a contract without delivery will not pass property (*c*).

What in-
formal
contracts
enforce-
able.

The privileged informal contracts were the following: (*a*) *Real* contracts, where the *causa* consisted in the delivery of money or goods: namely *mutui datio*, *commodatum*, *depositum*, *pignus*: corresponding to our bailments. This class was expanded within historical times to cover the so-called innominate contracts denoted by the formula *Do ut des*, &c. (*d*), so that there

(*a*) They gave rise however to imperfect or "natural" obligations which had other legal effects.

(*b*) "Obligatio quatuor species habet quibus contrahitur et plura vestimenta," Bracton, 99a. "Obligacioun deit estre vestue de v. maneres de garnisementz," Britton 1. 156. Austin (2. 1016, 3rd ed.) speaks *per incuriam* of the right of action itself, instead of that which gives the right, as being the "clothing."

(*c*) Austin, 2. 1002. Traditionibus et usucapionibus dominia rerum,

non nudis pactis, transferuntur. Cod. 2. 3. de pactis, 20. But the context is not preserved, and the particular *pactum* in question may perhaps have been *nudum* in the general sense too.

(*d*) Aut enim do tibi, ut des, aut do ut facias, aut facio ut des, aut facio ut facias; in quibus quaeritur quae obligatio nascatur. D. 19. 5. de praescr. verbis, 5 pr. and see Vangerow, Pand. § 599 (3. 234, 7th ed.). Blackstone (Comm. 2. 444) took this formula for a classification of *all* valuable considerations, and

was an enforceable obligation *re contracta* wherever, as we should say, there was a consideration executed: yet the procedure in the different classes of cases was by no means uniform (a). (β) *Consensual* contracts, being contracts of constant occurrence in daily life in which no *causa* was required beyond the nature of the transaction itself. Four such contracts were recognized from the earliest times of which we know anything, namely, Sale, Hire, Partnership, and Agency. (*Emtio Venditio, Locatio Conductio, Societas, Mandatum.*) To this class great additions were made in later times. Subsidiary contracts (*pacta adiecta*) entered into at the same time and in connexion with contracts of an already enforceable class became likewise enforceable: and divers kinds of informal contracts were specially made actionable by the Edict and by imperial constitutions, the most material of these being the *constitutum*, covering the English heads of *account stated* and *guaranty* (b). Even after all these extensions, however, matters stood thus: "The Stipulation, as the only formal agreement existing in Justinian's time, gave a right of action. Certain particular classes of agreements also gave a right of action even if informally made. All other informal agreements (*nuda pacta*) gave none. This last proposition, that *nuda pacta* gave no right of action, may be regarded as the most characteristic principle of the Roman law of Contract" (c). We may now see the importance of bearing in mind that in Roman, and therefore also in early English law, *nudum pactum* does not mean an agreement made without consideration

So far the Roman theory When it came to be adopted or revived in Western Christendom, what happened in Germany was, according to Savigny, that the form of the Stipulation being foreign and unsupported by any real national custom like that which kept it alive among the Romans, never found its way into practice: and as there was nothing to put in its place, the distinction between formal and informal agreements disappeared (d). The conclusion is that in the modern Roman law of Germany the requirement of *causa* does not exist. But this conclusion is by no means undisputed; in fact there is a decided conflict of

his blunder has been copied without reflection by later writers.

(a) Dig. Lc. §§. 1-4.

(b) The establishment of *emphyteusis* as a distinct species of con-

tract is of minor importance for our present purpose.

(c) Sav. Obl. 2. 231.

(d) Sav. Obl. 2. 239.

Modern
civil law.

opinion among modern writers, though the greater weight of authorities appear to be for the proposition here stated. It has even been maintained that a *causa* was required for the full validity of a Stipulation in the Roman law itself (*a*). Something of the same kind seems to have happened in Scotland, where no consideration is needed to make a contract binding: this is qualified however by the rule that a gratuitous promise cannot be proved by oral evidence but only by writing (*b*). In French jurisprudence on the other hand the Roman *causa* has persisted (though in a pretty liberal interpretation) as a needful ingredient of every binding contract. Instead of *pacta* becoming *legitimae conventiones*, the *legitimae conventiones* have simply vanished. We shall see more of this in the next chapter.

Corresponding
English
doctrine in
Bracton,
&c.

But our English authors did find something to put in the place of the Stipulation: namely the solemnities of a deed. Bracton after setting forth almost in the very words of the Institutes how "*Verbis contrahitur obligatio per stipulationem*" (*c*), &c. adds: "*Et quod per scripturam fieri possit stipulatio et obligatio videtur, quia si scriptum fuerit in instrumento aliquem promisisse, perinde habetur ac si interrogatione praecedente responsum sit*" (*d*). There is no doubt that he means only a writing under seal, though it is not so expressed: Fleta does say in so many words that a writing unsealed will not do (*e*). The equivalent for the Roman Stipulation being thus fixed, the classes of Real and Consensual contracts are recognized, in the terms of Roman law so far as the recognition goes: but the Consensual contracts are so meagrely handled that it looks as if they were introduced only for form's sake (*f*). We hear of nothing corresponding to the later Roman extensions of the validity of informal agreements. Such agreements in general

(*a*) See Vangerow, Pand. § 600 (3, 244).

(*b*) Erskine Pr. of Law of Sc. Bk. 3, Tit. 2, § 1; Bk. 4, Tit. 2, § 11.

(*c*) One may doubt whether an English court ever in fact enforced or would have enforced a Stipulation proper, as well as whether it ever entertained an "*actio legis Aquiliae de hominibus per feloniam occisis*," fo. 103b.

(*d*) 99b, 100a.

(*e*) Lib. 2, c. 60, § 25. Non

solum sufficiet scriptura nisi sigilli munimine stipulantis roboretur cum testimonio fide dignorum praesentium. The wrong use of *stipulans* for the covenantor deserves remark.

(*f*) Güterbock (p. 113) justly remarks that what Bracton says of the Contract of Sale in another place (fo. 61b) shows that it was not a true consensual contract in his view. The passage is curious, inasmuch as it contradicts the modern law of England in nearly all points, and the civil law in most.

give no right of action : in Glanville it is expressly said : "Privatas conventiones non solet curia domini regis tueri" (a), in a context suggesting that in his time even the regular consensual contracts of the civil law fell within the proposition.

The sum of the matter seems to have been thus. As to formal contracts : A contract under seal could be enforced by action of debt (*placitum de debito*). It was a good defence that the party's seal had been lost and affixed by a stranger without his knowledge, at least if the owner had given public notice of the loss (b) ; but not if it had been misapplied by a person in whose custody it was ; for then, it was said, it was his own fault for not having it in better keeping. This detail shows how much more archaic English law still was than the developed Roman system from which it borrowed much of its language : and also that delivery was not then known as one of the essential requisites of a deed. As to informal contracts : An action of debt might be brought for money lent, or the price of goods sold and delivered, and an action of detinue (which was but a species of debt) for chattels bailed (c). And probably an action of debt might be maintained for work done or on other consideration completely executed. At least the *contractus innominati* (*do ut des*, &c.) are distinctly recognized by the text-writers, though in Bracton strangely out of their natural place, under the head of conditional grants (Bracton 18b, 19a ; Fleta l. 2, c. 60 § 23) (d).

Remedies on Contracts in 13th century. Debt on covenant.

Debt on simple contract, detinue, &c.

(a) Lib. 10, c. 18. "Curia domini regis" is significant, for the ecclesiastical courts did take cognizance of breaches of informal agreements as being against good conscience, *ib.* c. 12, and see Blackstone's Comm. 1. 52, and authorities there cited, and Archdeacon Hale's Series of Precedents and Proceedings, where several instances will be found. It is worth noting that they seem to cease after the end of the 15th century, i.e. when the action of assumpsit in the temporal courts had become well established, and therefore the spiritual courts would have been prohibited from entertaining such matters, as they had already been prohibited from entertaining suits nominally *pro*

laesione fidei, but really equivalent to actions of debt or the like : Y. B. 38 H. 6, 29, pl. 11.

(b) Glanville (L. 10, c. 12) has not even this : Britton, 1, 164, 166 as in the text. "Pur ceo qe il ad conu le fet estre soen en partie, soit agardé pur le pleyntif et se purveye autre foiz le defendaunt de meillour gardeyn." Cp. Fleta, l. 6, c. 33, § 2 ; c. 34, § 4.

(c) For the precise difference in the developed forms of pleading see per Maule, J. 15 C. B. 803.

(d) In Bracton fo. 19a, lines 14, 15, *si* (the second) and *possunt* are obvious misprints for *sed* and *possum*, also we must read with Güterbock "ut repetere non possim."

About two centuries later we find it quite clear that an action of debt will lie on any consideration executed (though the term is not used) and also—which marks a decided advance since Bracton's time—that on a contract for the sale of either goods or land an action may be maintained for the price before the goods are delivered or seisin given of the land (a).

Obligations *quasi ex contractu* might in some cases at least be enforced by action of debt. Such an action brought to recover money paid on a failure of consideration was held good in form (though there was in fact a covenant), Y. B. 21 & 22 Ed. 1, p. 603 (Rolls ed.) [A.D. 1294] where it is also said that money paid as the price of land might be recovered back in an action of debt if the seller would not enfeoff the buyer. This action was probably a direct imitation of the Roman *Condictio*, and must not be confused with the modern action of *assumpsit* on the "common counts."

Account.

The action of account was also in use, see 52 Hen. 3 (Stat. Marl.) c. 17, 13 Ed. 1 (Stat. Westm. 2) c. 23. It seems to have been for a long time a remedy of wide application (sometimes exclusively, sometimes concurrently with debt) to enforce claims of the kind which in modern times have been the subject of actions of *assumpsit* for money had and received or the like. It covered apparently all sorts of cases where money had been paid on condition or to be dealt with in some way prescribed by the person paying it (see cases in 1 Rol. Abr. 116). One must not be misled by the statement that "no man shall be charged in account but as guardian in socage, bailiff or receiver" (11 Co. Rep. 89, Co. Lit. 172 a) : for it is also said "a man shall have a writ of account against one as bailiff or receiver where he was not his bailiff or receiver : for if a man receive money for my use I shall have an account against him as receiver ; or if a man deliver money unto another to deliver over unto me, I shall have an account against him as my receiver" (F. N. B. 116 Q). This action might be brought by one partner against another (*ib.* 117 D). At common law it could not be brought by executors, except, it seems, in the case of merchants, nor against them unless at the suit of the Crown (Co. Lit. 90 b, and see *Earl of Devonshire's*

(a) Y. B. Mich. 37 H. 6 [A.D. 1459] 8, pl. 18, by Prisot, C. J.

ca. 11 Rep. 89): but it was made applicable both for and against executors by various statutes to which it is needless to refer particularly (a). In modern times this action has become all but obsolete (b).

On informal executory agreements there was in general no remedy in the King's Courts. The Ecclesiastical Courts however took notice of them (see note p. 125 *supra*): and it may well be that executory mercantile contracts were also recognized in the special courts which administered the law merchant. But we cannot here attempt to throw any light on that which Lord Blackburn has found to be one of the obscurest passages in the history of the English law (c). Also there are traces of exceptions by local custom. We read in F. N. B. 146 A. that "in London a man shall have a writ of covenant without a deed for the covenant broken," but the authorities referred to do not bear this out (d).

Where no
remedy
at common
law.

It is not without significance that when a general remedy was at last found indispensable it was introduced in the form of an action nominally *ex delicto*. It was a new variety of trespass on the case that ultimately became the familiar action of assumpsit and the ordinary way of enforcing simple contracts. The final prevalence of assumpsit over debt was no doubt much aided by the defendant not being able to wage his law and by certain other advantages: but the reason of its original introduction was to supply a remedy where debt would not lie at all. This was not effected without some failures. The first recorded case is abridged by Reeves, and translated by Mr. C. P. Cooper (e), but is curious enough to bear repeating. The action was against a carpenter for having failed to build certain

Later in-
tro-
duction
of assump-
sit.

(a) The action is given against executors by 4 & 5 Ann. c. 3 (Rev. Stat. ; 4 Ann. c. 16 in Ruffhead) s. 27.

(b) See Lindley Ptnp. 1, 66; note r, 2. 909, note c.

(c) Blackburn on the Contract of Sale, 207-8. In addition to the quotation there from the Year Book of Ed. 4, see now Y. B. 21 & 22 Ed. 1. p. 458.

(d) The Year Book 27 H. 6. 10, pl. 6, shows only that by the custom

of London a covenant to repair by the lessor was implied in leases: the case in 1 Leo. 2 shows a custom at Bristol "that conventio ore tenus facta shall bind the covenantor as strongly as if it were made by writing," which being taken strictly was held not to bind executors.

(e) Hist. Eng. Law (Ed. Finlason), 2. 508, 1 C. P. Cooper, Appx. 549, where subsequent cases are also collected and translated.

houses as he had contracted to do. The writ ran thus : " Quare cum idem [the defendant] ad quasdam domos ipsius Laurentii [the plaintiff] bene et fideliter infra certum tempus de novo construend' apud Grimesby assumpsisset, praedictus tamen T. domos ipsius L. infra tempus praedictum, &c., construere non curavit ad dampnum ipsius Laurentii decem libr', &c." The report proceeds to this effect :—

" *Tirwit.*—Sir, you see well that his count is on a covenant, and he shows no such thing : judgment.

Gascoigne.—Seeing that you answer nothing, we ask judgment and pray for our damages.

Tirwit.—This is covenant or nothing (*ceo est merement un covenant*).

Brenchesley, J.—It is so : perhaps it would have been otherwise had it been averred that the work was begun and then by negligence left unfinished.

(*Hankford, J.* observed that an action on the Statute of Labourers might meet the case.)

Rickhill, J.—For that you have counted on a covenant and show none, take nothing by your writ but be in mercy" (a).

This was followed by at least one similar decision (b), but early in the reign of Henry VI. a like action was brought against one Watkins for failure to build a mill within the time for which he had promised it, and two out of three judges (Babington, C.J., and Cockaine, J.) were decidedly in favour of the action being maintainable and called on the defendant's counsel to plead over to the merits (c). Martin, J. dissented, insisting that an action of trespass would not lie for a mere non-feasance : a difficulty by no means frivolous in itself. " If this action is to be maintained on this matter," he said, " one shall have an action of trespass on every agreement that is broken in the world." This however was the very thing sought, and so it came to pass in the two following reigns, when the general application of the action of assumpsit was well established (see Reeves, 3. 182, 403). It is only since the Common Law Procedure Act that there has been in form as well as in substance a consistent and appropriate procedure for enforcing executory simple contracts.

(a) Mich. 2 H. 4, 3b, pl. 9.

(b) Mich. 11 H. 4. 33, pl. 60.

(c) Hil. 3 H. 6, 36, pl. 33.

We need not stop to consider the requisites of a deed, but it may be noticed that when the books (*e.g.* Shepp. Touchst. 54) say a deed must be written on parchment or paper, not on wood, &c., this is not due, as a modern reader might at first sight think, to mere exuberance of fancy or abundance of caution. The key is to be found, we believe, in the common use of wooden tallies as records of contracts in the middle ages, and in the fuller statement of Fitzherbert (F. N. B. 122 I) that if such a tally is sealed and delivered by the party it will not be a deed. The Year Books there referred to (so far as we can verify the references: some are wrong and we have not been able to set them right) show that attempts were in fact made to rely on sealed tallies as equivalent to deeds. These tallies were no doubt written upon as well as notched, so that nothing could be laid hold of to refuse them the description of deeds but the fact of their being wooden: the writing is expressly mentioned in one case (*a*), and the Exchequer tallies used till within recent times were likewise written upon (*b*).

Rule that deeds may not be written on wood, &c.: suggested origin thereof.

The foregoing sketch has shown how in the ancient view no informal contract is good unless it falls within some exceptionally favoured class: the modern view to which the law of England has now long come round is the reverse, namely that no contract need be in any particular form unless it belongs to some class in which a particular form is specially required.

Requirements of form now treated as the exception.

Before we say anything of these classes it must be mentioned that contracts under seal are not the only formal contracts known to English law. There are certain "contracts of record" which are of a yet higher nature than contracts by deed. The judgment of a Court of Record is treated for some purposes as a contract: and a recognizance, *i.e.* "a writing obligatory acknowledged before a judge or other officer having authority for that purpose and enrolled in a Court of Record" is strictly and properly a contract

Contracts of Record.

(*a*) Trin. 12 H. 4. 23, pl. 3. The other cases we have been able to find are Pasch. 25 E. 3. 83 (wrongly referred to as 40 in the last case and in the margin of Fitzh.) pl. 9, where the reporter notes it is said to be [by custom] otherwise in London; and Trin. 44 Ed. 3. 21, pl. 23.

(*b*) See account of them in Penny Cyclopædia, s. v. Tally. The use of tallies appears not to be obsolete on the Continent. The French (art. 1333) and Italian (art. 1332) Civil Codes expressly admit them as evidence between traders who keep their accounts in this way.

entered into with the Crown in its judicial capacity. The statutory forms of security known as statutes merchant, statutes staple, and recognizances in the nature of a statute staple, were likewise of record, but they have long since fallen out of use (*a*).

The kinds of contracts subject to restrictions of form are these :

Contracts
subject to
special
forms.

(1). At common law, the contracts of corporations. The rule that such contracts must in general be under seal is remarkable as not being an institution of modern positive law but a survival from a time when the modern doctrine of contracts was yet unformed. Of late years great encroachments have been made upon it, which have probably not reached their final limits ; as it stands the law is in a state of transition or fluctuation on some points, and demands careful consideration. Both the historical and the practical reason lead us to give this topic the first place.

(2). Partly by the law merchant and partly by statute, the peculiar contracts expressed in negotiable instruments.

(3.) By statute only—

A. The various contracts within the Statute of Frauds. Certain sales and dispositions of property are regulated by other statutes, but mostly as transfers of ownership or of rights good against third persons rather than as agreements between the parties.

B. Marine insurances.

C. Transfer of shares in companies (generally).

D. Acknowledgment of debts barred by the Statute of Limitation of James I.

E. Marriage : This, although we do not mean to enter on the subject of the Marriage Acts, must be mentioned here to complete the list.

1. *As to Contracts of Corporations.*

Corpora-
tions.
Old rule:
Seal gene-

The doctrine of the common law was that corporations could bind themselves only under their common seal, except in small matters of daily occurrence, as the appointment of household

(*a*) As to Contracts of Record, see Leake, Chap. 1, Sect. 3, and for an account of statutes merchant, &c. 2 Wms. Saund, 216-222.

servants and the like (a). The principle of these exceptions rally required. being, in the words of the Court of Exchequer Chamber, "convenience amounting almost to necessity" (b), the vast increase in the extent, importance, and variety of corporate dealings which has taken place in modern times has led to a corresponding increase of the exceptions. Before considering these, however, it is well to cite an approved judicial statement of the rule, and of the reasons that may be given for it:—

"The seal is required as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature or otherwise, then undoubtedly the adding a seal would be matter purely of form and not of substance. Everyone becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act; and persons dealing with the corporation know that by such an act the body will be bound. But in other cases the seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerously attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing: either a seal or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of a whole body corporate, is a necessity inherent in the very nature of a corporation" (c).

It is, no doubt, a matter of "inherent necessity" that an artificial person can do nothing save by an agent: and the common seal in the agent's custody, when an act in the law purports to be the act of the corporation itself, or his authority under seal, when it purports to be the act of an agent for the corporation, is in English law the recognized symbol of his authority. But there is no reason in the nature of things why his authority should not be manifested in other ways: nor is the seal of itself conclusive, for an instrument to which it is in fact

(a) 1 Wms. Saund. 615, 616, and see old authorities collected in notes to *Arnold v. Mayor of Poole*, 4 M. & Gr. 876, and *Fishmongers' Company v. Robertson*, 5 M. & Gr. 182.

(b) *Church v. Imperial Gas, &c., Company*, 6 A. & E. 846, 861.

(c) *Mayor of Ludlow v. Charlton*, 6 M. & W. 815, 823, adopted by Pollock, B., in *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. at p. 24, and see per Keating, J., *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. at p. 95.

affixed without authority is not binding on the corporation (*a*). On the other hand, although it is usual and desirable for the deed of a corporation to be sealed with its proper corporate seal, it is laid down by high authorities that any seal will do (*b*). A company under the Companies Act, 1862, must have its name engraved in legible characters on its seal, and any director, &c., using as the seal of the company any seal on which the name is not so engraved is subject to a penalty of 50*l.* (ss. 41, 42): but this would not, it is conceived, prevent instruments so executed from binding the company (*c*). The seal of a building society incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42, s. 16, sub-s. 10), "shall in all cases bear the registered name thereof," but no penalty or other consequence is annexed to the non-observance of this direction.

Modern exceptions.
Bank of Columbia v. Patterson (Supreme Court, U. S.)

We now turn to the exceptions. According to the modern authorities it is now established, though not till after sundry conflicting decisions, that the "principle of convenience amounting almost to necessity" will cover all contracts which can fairly be treated as necessary and incidental to the purposes for which the corporation exists: and that in the case of a trading corporation all contracts made in the ordinary course of its business or for purposes connected therewith fall within this description. The same or even a wider conclusion was much earlier arrived at in the United States. As long ago as 1813 the law was thus stated by the Supreme Court:—

"It would seem to be a sound rule of law that wherever a corporation is acting within the scope of the legitimate purposes of its

(*a*) *Bank of Ireland v. Evans' Charities*, 5 H. L. C. 389.

(*b*) 10 Co. Rep. 30*b*, Shepp. Touchst. 57, *supra*, p. 99. Yet the rule is doubted, Grant on Corp. 59, but only on the ground of convenience and without any authority. The like rule as to sealing by an individual is quite clear and at least as old as Bracton: Non multum refert utrum [charta] proprio vel alieno sigillo sit signata, cum semel a donatore coram testibus ad hoc vocatis recognita et concessa fuerit, fo. 38*a*. Cp. Britton, l. 257.

(*c*) Notwithstanding the statutory penalty, there is an instance on re-

cord of the private seal of a director being used when the company had been so recently formed that there had been no time to make a proper seal, *Gray v. Lewis*, 8 Eq. at p. 531. The like direction and penalty are contained in the Industrial and Provident Societies Act 1876, 39 & 40 Vict. c. 45, ss. 10, sub-a. 1, and 18, sub-s. 2. As to execution of deeds abroad by companies under the Acts of 1862 and 1867, see the Companies Act 1862, s. 55, and the Companies Seals Act 1864 (27 Vict. c. 19); in Scotland, the Conveyancing (Scotland) Act 1874, 37 & 38 Vict. c. 94, s. 56.

institution all parole contracts made by its authorized agents are express promises of the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action may well lie (a)."

This broad statement cannot at present be said to be correct in England except for trading corporations, and perhaps also for non-trading corporations established in modern times for special purposes: and with all respect for the reasons of the Court of Exchequer in *Mayor of Ludlow v. Charlton* (b), one may perhaps venture to regret that we have not adopted the rule laid down by the American Supreme Court in its fulness and simplicity. The former conflict of decisions is now much reduced, but there remains the inconvenient distinction of two if not three different rules for corporations of different kinds.

As concerns trading corporations the law may be taken as settled by the unanimous decisions of the Court of Common Pleas and of the Exchequer Chamber in *South of Ireland Colliery Co. v. Waddle* (c). The action was brought by the Company against an engineer for non-delivery of pumping machinery, there being no contract under seal. Bovill, C.J. said in the Court below that it was impossible to reconcile all the decisions on the subject: but the exceptions created by the recent cases were too firmly established to be questioned by the earlier decisions, which if inconsistent with them must be held not to be law:—

Not so wide in England.

Trading corporations: Contracts in course of business don't want seal. S. of Ireland Colliery Co. v. Waddle.

"These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents,—managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts [this exception is far from being unqualified, see *Royal British Bank v. Turquand &c. supra*, p. 109], they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent

(a) *Bank of Columbia v. Patterson*, 7 Cranch, 299, 306.

(b) 6 M. & W. 815.

(c) L. R. 3 C. P. 463, in Ex.

Ch. 4 C. P. 617. Most if not all of the previous authorities are there referred to.

occurrence and small importance. The authorities however do not sustain the argument."

Cases over-
ruled,
semble.

The decision was affirmed on appeal without hearing counsel for the plaintiffs, and Cockburn, C.J. said the defendant was inviting the Court to reintroduce a relic of barbarous antiquity. It is submitted that the following cases must since this be considered as overruled:—

East London Waterworks Co. v. Bailey, 4 Bing. 283. Action for non-delivery of iron pipes ordered for the company's works (a). Expressly said in the Court below to be no longer law, per Montague Smith, J. See L. R. 3 C. P. 475.

Homersham v. Wolverhampton Waterworks Co. 6 Ex. 137, 20 L. J. Ex. 193. Contract under seal for erection of machinery: price of extra work done with approval of the company's engineer and accepted, but not within the terms of the sealed contract, held not recoverable.

Diggle v. London & Blackwall Ry. Co. 5 Ex. 442, 19 L. J. Ex. 308. Work done on railway in alterations of permanent way &c.: this case already much doubted in *Henderson v. Australian Royal Mail &c. Co.* 5 E. & B. 409, 24 L. J. Q. B. 322, which is now confirmed in its full extent by the principal case.

Probably *Finlay v. Bristol & Exeter Ry. Co.* 7 Ex. 409, 21 L. J. Ex. 117, where it was held that against a corporation tenancy could in no case be inferred from payment of rent so as to admit of an action for use and occupation without actual occupation.

Also *London Dock Co. v. Sinnott*, 8 E. & B. 347, 27 L. J. Q. B. 129, where a contract for scavenging the company's docks for a year was held to require the seal, as not being of a mercantile nature nor with a customer of the company, can now be of little or no authority beyond its own special circumstances: see per Bovill, C. J. L. R. 3 C. P. 471.

Even in the House of Lords it has been assumed and said, though fortunately not decided, that a formal contract under seal made with a railway company cannot be subsequently varied by any informal mutual consent: *Midland G. W. Ry. Co. of Ireland v. Johnson*, 6 H. L. C. 798, 812.

Cases
affirmed.

The following cases are affirmed or not contradicted. Some of them were decided at the time on narrower or more particular

(a) The directors were authorized by the incorporating Act of Parliament to make contracts; but it was held that this only meant they might affix the seal without calling a meeting.

grounds, and in one or two the trading character of the corporation seems immaterial :—

Beverley v. Lincoln Gas Co. 6 A. & E. 829. Action against the company for price of gas meters supplied.

Church v. Imperial Gas Co. *ib.* 846, in Ex. Ch. Action by the company for breach of contract to accept gas. A supposed distinction between the liability of corporations on executed and on executory contracts was exploded.

Copper Miners of England v. Fox, 16 Q. B. 229, 20 L. J. Q. B. 174. Action (in effect) for non-acceptance of iron rails ordered from the company. The company had in fact for many years given up copper mining and traded in iron, but this was not within the scope of its incorporation.

Lowe v. L. & N. W. Ry. Co. 18 Q. B. 632, 21 L. J. Q. B. 361. The company was held liable in an action for use and occupation when there had been an actual occupation for corporate purposes, partly on the ground that a parol contract for the occupation was within the statutory powers of the directors and might be presumed: *cp.* the next case.

Pauling v. L. & N. W. Ry. Co. 8 Ex. 867, 23 L. J. Ex. 105. Sleepers supplied to an order from the engineer's office and accepted: there was no doubt that the contract could under the Companies Clauses Consolidation Act be made by the directors without seal, and it was held that the acceptance and use were evidence of an actual contract.

Henderson v. Australian Royal Mail &c. Co. 5 E. & B. 409, 24 L. J. Q. B. 322. Action on agreement to pay for bringing home one of the Company's ships from Sydney. Here it was distinctly laid down that "where the making of a certain description of contracts is necessary and incidental to the purposes for which the corporation was created" such contracts need not be under seal (by Wightman J.): "The question is whether the contract in its nature is directly connected with the purpose of the incorporation" (by Erle, J.).

Same Company v. Marzetti, 11 Ex. 228, 24 L. J. Ex. 273. Action by the company on agreement to supply provisions for its passenger ships.

Reuter v. Electric Telegraph Co. 6 E. & B. 341, 26 L. J. Q. B. 46. Where the chief point was as to the ratification by the directors of a contract made originally with the chairman alone, who certainly had no authority to make it.

Claim of Ebbw Vale Company, 8 Eq. 14, decides that one who sells to a company goods of the kind used in its business need not ascertain that the company means so to use them, and is not prevented from enforcing the contract even if he had notice of an intention to use them otherwise.

Non-trading corporations. When created for special purposes : State of authorities. "Necessary and incidental" contracts don't want seal.

As concerns non-trading corporations, the question has never been decided by a Court of Appeal. But the weight of the most recent authorities, together with the analogy of those last considered, seems practically to give a sufficient warrant for the statement made above, that all contracts necessary and incidental to the purposes for which the corporation exists may be made without seal, at least when the corporation has been established for special purposes by a modern statute or charter. On the rule as thus limited the latest case is *Nicholson v. Bradfield Union* (a), where it was held that a corporation is liable without a contract under seal for goods of a kind which must be from time to time required for corporate purposes, at all events when they have been actually supplied and accepted. Earlier decisions are as follows :—

Sanders v. St. Neot's Union, 8 Q. B. 810, 15 L. J. M. C. 104. Iron gates for workhouse supplied to order without seal and accepted.

Paine v. Strand Union, *ib.* 326, 15 L. J. M. C. 89, is really the same way, though at first sight *contra* : the decision being on the ground that making a plan for rating purposes of *one parish* within the union was not incidental to the purposes for which the guardians of the *union* were incorporated : they had nothing to do with either making or collecting rates in the several parishes, nor had they power to act as a corporation in matters confined to any particular parish.

Clarke v. Cuckfield Union, 21 L. J. Q. B. 349 (in the Bail Court, by Wightman, J.) Builders' work done in the workhouse. The former cases are reviewed.

Haigh v. North Brierly Union, E. B. & E. 873, 28 L. J. Q. B. 62. An accountant employed to investigate the accounts of the union was held entitled to recover for his work as "incidental and necessary to the purposes for which the corporation was created," by Erle, J., Crompton, J. doubting.

In direct opposition to the foregoing we have only one decision, but a considered one, *Lamprell v. Billericay Union*, 3 Ex. 283, 18 L. J. Ex. 282. Building contract under seal, providing for extra works on written directions of the architect. Extra work done and accepted but without such direction. Held, with an expression of regret, that against an individual this might have given a good distinct cause of action on simple contract, but this would not help the plaintiff, as the defendants could be bound only by deed.

Municipal With regard to municipal corporations (and it is presumed

(a) L. R. 1 Q. B. 620.

other corporations not created for definite public purposes) the ancient rule seems to be still in force to a great extent. An action will not lie for work done on local improvements (a), or on an agreement for the purchase of tolls by auction (b), without an agreement under seal. The Court of Common Pleas has very lately held that where a municipal corporation owns a graving dock a contract to let a ship have the use of it need not be under the corporate seal. This was put however on the ground that the case does fall within the ancient exception of convenience resting on the frequency or urgency of the transaction. The admission of a ship into the dock is a matter of frequent and ordinary occurrence and sometimes of urgency (c).

corporations, &c.:
Old rule in
force,
semble.

There has also been little disposition to relax the rule in the case of appointments to offices, and it seems at present that such an appointment, if the office is of any importance, must be under the corporate seal to give the holder a right of action for his salary or other remuneration. This appears by the following instances :—

Appoint-
ments to
offices by
corpora-
tions.

Appointment of attorney : *Arnold v. Mayor of Poole*, 4 M. & Gr. 860. It is true that the corporation of London appoints an attorney in court without deed, but that is because it is matter of record : see pp. 882, 896. But after an attorney has appeared and acted for a corporation the corporation cannot, as against the other party to the action, dispute his authority on this ground : *Faviell v. E. C. Ry. Co.* 2 Ex. 344, 17 L. J. Ex. 223, 297. Nor can the other party dispute it after taking steps in the action : *Thames Haven, &c. Co. v. Hall*, 5 M. & Gr. 274. Cp. *Reg. v. Justices of Cumberland*, 17 L. J. Q. B. 102.

Grant of military pension by the East India Company in its political capacity : *Gibson v. E. I. Co.* 5 Bing. N. C. 262.

Increase of town clerk's salary in lieu of compensation : *Reg. v. Mayor of Stamford*, 6 Q. B. 434, L. J. Dig. 6. 422.

Office with profit annexed (coal meter paid by dues) though held at the pleasure of the corporation : *Smith v. Cartwright*, 6 Ex. 927, 20 L. J. Ex. 401. (The action was not against the corporation but against the person by whom the dues were alleged to be payable. The claim was also wrong on another ground.)

Collector of poor rates : *Smart v. West Ham Union*, 10 Ex. 867,

(a) *Mayor of Ludlow v. Charlton*, 6 M. & W. 815. *Hardwick*, L. R. 9 Ex. 13.
(b) *Mayor of Kidderminster v.* L. R. 10 C. P. 402.
(c) *Wells v. Kingston-upon-Hull*,

24 L. J. Ex. 201 ; but partly on the ground that the guardians had not undertaken to pay at all, the salary being charged on the rates ; and wholly on that ground in Ex. Ch., 11 Ex. 867, 25 L. J. Ex. 210.

Clerk to master of workhouse : *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 91.

Dunstan v. Imperial Gas Light Co. 3 B. & Ad. 125, as to director's fees voted by a meeting ; but chiefly on the ground that the fees were never intended to be more than a gratuity.

Cope v. Thames Haven &c. Co. 3 Ex. 841, 18 L. J. Ex. 345 : agent appointed for a special negotiation with another company not allowed to recover for his work, the contract not being under seal nor in the statutory form, viz. signed by three directors in pursuance of a resolution, although by another section of the special Act the directors had full power to "appoint and displace . . . all such managers, officers, agents . . . as they shall think proper." It seems difficult to support this decision ; this was not like an appointment to a continuing office ; and cp. *Reg. v. Justices of Cumberland*, 17 L. J. Q. B. 102, where under very similar enabling words an appointment of an attorney by directors without seal was held good as against third parties.

No equity to enforce informal agreement against corporation.

It has been decided (as indeed it is obvious in principle) that inability to enforce an agreement with a corporation at law by reason of its not being under the corporate seal does not create any jurisdiction to enforce it in equity (*a*).

Right of corporations to sue on contracts executed.

Tenancy and occupation.

The rights of corporations to sue upon contracts are somewhat more extensive than their liabilities. When the corporation has performed its own part of the contract so that the other party has had the benefit of it, the corporation may sue on the contract though not originally bound (*b*). For this reason, if possession is given under a demise from a corporation which is invalid for want of the corporate seal, and rent paid and accepted, this will constitute a good yearly tenancy (*c*) and will enable the corporation to enforce any term of the agreement which is applicable to such a tenancy (*d*), and a tenant who has occupied and enjoyed corporate

(*a*) *Kirk v. Bromley Union*, 2 Phill. 640.

(*b*) *Fishmongers' Co. v. Robertson*, 5 M. & Gr. 131. The judgment on this point is at pp. 192-6 ; but the dictum contained in the passage "Even if . . . against themselves," pp. 192-3 (extending the right to sue

without limit) is now overruled. See *Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 18, 21.

(*c*) *Wood v. Tate*, 2 B & P. N. R. 247.

(*d*) *Eccles. Commrs. v. Merral*, L. R. 4 Ex. 162. By Kelly, C. B., this is correlative to the tenant's

lands without any deed may be sued for use and occupation (a). Conversely the presumption of a demise from year to year from payment and acceptance of rent is the same against a corporation as against an individual landlord: "where the corporation have acted as upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made" (b). And a person by whose permission a corporation has occupied lands may sue the corporation for use and occupation (c).

In the case of a yearly tenancy the presumption is of an actual contract, but the liability for use and occupation belongs rather to the class of obligations *quasi ex contractu*, which we call by the very inconvenient name of "contracts implied in law" (d). It is settled that in general a cause of action of this kind is as good against a corporation as against a natural person. Thus a corporation may be sued in an action for money received on the ground of strict necessity; "it cannot be expected that a corporation should put their seal to a promise to return moneys which they are wrongfully receiving" (e). It was held much earlier that trover could be maintained against a corporation—a decision which, as pointed out in the case last cited, was analogous in principle though not in form (f).

Corporations liable on quasi-contracts generally.

Forms of contracting otherwise than under seal are provided by many special or general Acts of Parliament creating or regulating corporate companies, and contracts duly made in

Statutory forms of contract.

right to enforce the agreement in equity on the ground of part performance, *sed qu.*

(a) *Mayor of Stafford v. Till*, 4 Bing. 75. The like as to tolls, *Mayor of Carmarthen v. Lewis*, 6 C. & P. 608, but see Serj. Manning's note, 2 M. & Gr. 249.

(b) *Doe d. Pennington v. Tanriere*, 12 Q. B. 998, 1013, 18 L. J. Q. B. 49.

(c) *Lowe v. L. & N. W. Ry. Co.* 18 Q. B. 632, 21 L. J. Q. B. 361.

(d) The liability existed at common law, and the statute 11 Geo. 2, c. 19, s. 14, made the remedy by

action on the case co-extensive with that by action of debt, see *Gibson v. Kirk*, 1 Q. B. 850, 10 L. J. Q. B. 297. Since the C. L. P. Act the statute seems in fact superfluous.

(e) *Hall v. Mayor of Swansea*, 5 Q. B. 526, 549, 13 L. J. Q. B. 107. The like of a quasi corporation empowered to sue and be sued by an officer, *Jefferys v. Gurr*, 2 B. & Ad. 833.

(f) *Yarborough v. Bank of England*, 16 East 6. See early cases of trespass against corporations cited by Lord Ellenborough at p. 10.

those forms are of course valid (*a*). But a statute may on the other hand contain restrictive provisions as to the form of corporate contracts, and in that case they must be strictly followed. An enactment that contracts of a local board whose value should exceed 10% should be in writing and sealed with the seal of the local board has been held, though with great reluctance and even indignation, to be imperative. The claim, like sundry others above mentioned, was for extra work done without any formal order, the principal work being provided for by a contract in due form (*b*). The general results seem to stand thus :—

Summary
of results.

In the absence of enabling or restrictive statutory provisions, which when they exist must be carefully attended to—

A trading corporation may make without seal any contract incidental to the ordinary conduct of its business; but it cannot bind itself by negotiable instruments unless the making of such instruments is a substantive part of that business, or is provided for by its constitution (*c*).

A non-trading corporation, if expressly created for special purposes, may make without seal any contract incidental to those purposes; if not so created, cannot (it seems) contract without seal except in cases of immediate necessity, constant recurrence, or trifling importance.

In any case where an agreement has been completely executed on the part of a corporation, it becomes a contract on which the corporation may sue.

The rights and obligations arising from the tenancy or occupation of land without an express contract apply to corporations both as landlords and as tenants or occupiers in the same manner (*d*) and to the same extent as to natural persons.

A corporation is bound by an obligation implied in law whenever under the like circumstances a natural person would be so bound.

It will be seen that as touching non-trading corporations the law still leaves a good deal to be desired in certainty, and perhaps something in reasonableness; and it is much to be wished that the whole subject should be reviewed and put on a

(*a*) See Mr. Justice Lindley's account (l. 370-4). *Beer v. London & Paris Hotel Co.*, 20 Eq. 412, 426.

(*b*) *Frend v. Dennett*, 4 C. B. N. S. 576, 27 L. J. C. P. 314.

(*c*) See p. 117 *supra*.

(*d*) Assuming *Finlay v. Bristol and Exeter Ry. Co.* 7 Ex. 409, 21 L. J. Ex. 117, not to be now law.

settled and consistent footing by the Court of Appeal. In the present writer's opinion this could not be satisfactorily done without expressly overruling a certain number of the decided cases.

2. *Negotiable instruments.*

Negotiable
instru-
ments.

The peculiar contracts undertaken by the persons who issue or indorse negotiable instruments must by the nature of the case be in writing. A bill of exchange is defined as a *written* order for the payment of a certain sum of money unconditionally; a promissory note as a *written* promise to pay a certain sum of money unconditionally (*a*). The acceptance of a bill of exchange, though it may be verbal as far as the law merchant is concerned, is required by statute to be in writing (19 & 20 Vict. c. 97, s. 6, extending and superseding 1 & 2 Geo. 4, c. 78, s. 2, now expressly repealed by the Stat. Law Revision Act 1873). Additional forms were required in the case of negotiable instruments for less than 10*l.* by 17 Geo. 3, c. 30; but this was repealed by a temporary Act, 26 & 27 Vict. c. 105, which has since been continued from time to time by the annual Expiring Laws Continuance Acts.

3. *As to purely statutory forms.*

A. Contracts within the Statute of Frauds.

Statute of
Frauds.

To write a commentary on the Statute of Frauds would be quite beyond the scope of this work. It may be convenient however to state as shortly as possible, so far as contracts are concerned, the contents of the statute and some of the leading points established on the construction of it.

The statute (29 Car. 2, c. 3) enacts that no action shall be brought on any of the contracts specified in the 4th section "unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." The peculiar operation of this section as distinguished from the seventeenth will be considered in another place (Chapter XII.). The contracts comprised in it are—

(*a*) Smith, Merc. Law, 199, and c. 8 [Rev. Stat : *al.* 9] s. 1.
as to promissory notes, 3 and 4 Ann.

Promises
by exe-
cutor, &c.

a. Any special promise by an executor or administrator "to answer damages out of his own estate." No difficulty has arisen on the words of the statute, and the chief observation to be made is the almost self-evident one (which equally applies to the other cases within the statute) that the existence of a written and signed memorandum is made a necessary condition of the agreement being enforceable, but will in no case make an agreement any better than it would have been apart from the statute. A good consideration, a real consent of the parties to the same thing in the same sense, and all other things necessary to make a contract good at common law are still required as much as before (*a*).

Guaran-
ties.

β. "Any special promise to answer for the debt default or miscarriages of another person."

On this the principal points are as follows. A promise is not within the statute unless there is a debt &c. of some other person for which that other is to remain liable (though the liability need not be a present one): for there can be no contract of suretyship or guaranty unless and until there is an actual principal debtor. "Take away the foundation of principal contract, the contract of suretyship would fail" (*b*). Where the liability, present or future, of a third person is assumed as the foundation of a contract, but does not in fact exist, then, independently of the statute, and on the principle of the *Couturier v. Hastie* class of cases (explained elsewhere, Chap. VIII. *ad fin.*) there is no contract. On the other hand a promise to be primarily liable, or to be liable at all events, whether any third person is or shall become liable or not, is not within the statute and need not be in writing. Whether particular spoken words, not in themselves conclusive, *e.g.* "Go on and do the work and I will see you paid," amount to such a promise or only to a guaranty is a question of fact to be determined by the circumstances of the case (*b*).

Nor is a promise within the statute unless it is made to the principal creditor: "The statute applies only to promises made to

(*a*) As to these contracts of executors, 2 Wms. Exors. Pt. 4, Bk. 2. c. 2 § 1.

(*b*) *Mountstephen v. Lakeman*, L.

R. 7 Q. B. 196, 202 (in Ex. Ch.) per Willes, J., *affd.* L. R. 7 H. L. 17 *nom. Lakeman v. Mountstephen*.

the person to whom another is answerable" (a) or is to become so.

A mere promise of indemnity is not within the statute (b), though any promise which is in substance within it cannot be taken out of it by being put in the form of an indemnity (c).

A contract to give a guaranty at a future time is as much within the statute as the guaranty itself (d).

γ. "Any agreement made upon consideration of marriage." A promise to marry is not within these words, the consideration being not marriage, but the other party's reciprocal promise to marry. For further remarks on the effect of this clause see chapter XII., on Agreements of Imperfect Obligation, *infra*.

Agreements upon consideration of marriage.

In the old books we frequently meet with another sort of difficulty touching agreements of this kind; it was much doubted whether matrimony were not so purely spiritual a matter that all agreements concerning it must be dealt with only by the ecclesiastical courts: the type of these disputed contracts is a promise by A. to B. to pay B. 10*l.* if he will marry A.'s daughter. But this by the way (e).

δ. "Any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." This clause is usually and conveniently considered as belonging to the topic of Vendors and Purchasers of real estate; and the reader is referred to the well-known works which treat of that subject (f). Questions have arisen, however, whether sales of growing crops and the

Interests in land.

(a) *Eastwood v. Kenyon*, 11 A. & E. 438, 446; *concessa. Cripps v. Hartnoll*, 4 B. & S. 414, 32 L. J. Q. B. 381 (Ex. Ch.)

(b) *Cripps v. Hartnoll* (last note); *Wildes v. Dudlow*, 19 Eq. 198.

(c) *Cripps v. Hartnoll*.

(d) *Mallet v. Bateman*, L. R. 1 C. P. 163 (Ex. Ch.) See further on this clause, 1 Wms. Saund. 229-235, 1 Sm. L. C. 311, note to *Birkmyr v. Darnell*; Smith, Merc. Law, 456-9 (8th ed.).

(e) Such promise may be sued on in the King's Court if *by deed*, 22 Ass. 101, pl. 70; otherwise if he had promised 10*l.* *with his daughter in marriage*, then it should be in

the Court Christian; Trin. 45 Ed. 3. 24, pl. 80; action good without specialty where the marriage had taken place, Mich. 37 H. 6. 8, pl. 18; *contra* (not without dissent) Trin. 17 Ed. 4. 4, pl. 4.

(f) As to an agreement collateral to a demise of land not being within the statute, see the late cases of *Morgan v. Griffith*, L. R. 6 Ex. 70, *Erskine v. Adeane*, 8 Ch. 756, *Angell v. Duke*, L. R. 10 Q. B. 174. As to the distinction between a demise and a mere licence or agreement for the use of land without any change of possession, *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402.

like were sales of an interest in lands within the 4th section or of goods within the 17th; and these cases are accordingly discussed by Mr. Justice Blackburn and Mr. Benjamin in their expositions of the 17th section (*a*). A sale of tenant's fixtures, being a sale only of the right to sever the fixtures from the freehold during the term, is not within either section (*b*).

Leases. By the 1st and 2nd sections of the statute leases for more than three years, or reserving a rent less than two-thirds of the improved value, must be in writing and signed by the parties or their agents authorized *in writing*, and now by 8 and 9 Vict. c. 106, s. 3, they must be made by deed. But an informal lease, though void as a lease, may be good as an agreement for a lease (*c*).

Agreements not to be performed within a year. *ε.* "Any agreement that is not to be performed within the space of one year from the making thereof."

"Is not to be," not "is not" or "may not be." This means an agreement that on the face of it cannot be performed within a year. An agreement capable of being performed within a year, and not showing any intention to put off the performance till after a year, is not within this clause (*d*). Nor is an agreement within it which is completely performed by one party within a year (*e*). An agreement is not excluded from the operation of the clause by being made determinable on a contingency that may happen within a year (*f*).

As to s. 17. The seventeenth section of the statute (sixteenth in the Revised Statutes, but it will probably keep its accustomed name) (*g*) is extended by Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 7, and as so extended includes all executory sales of goods of the value of 10*l.* and upwards, whether the goods be in existence or not at the time of the contract. Its effect is thoroughly discussed and explained by Lord Blackburn (on the Contract of Sale,

(*a*) Blackburn on the Contract of Sale, 9-21, Benjamin on Sale, 91-105; *Marshall v. Green*, 1 C. P. D. 35. And see 1 Wms. Saund. 395, Leake, 131-5.

(*b*) *Lee v. Gaskell*, 1 Q. B. D. 700.

(*c*) Dart, V. & P. 1, 198.

(*d*) *Smith v. Neale*, 2 C. B. N. S. 67, 26 L. J. C. P. 143.

(*e*) *Cherry v. Heming*, 4 Ex. 631, 19 L. J. Ex. 63. See notes to *Peter v. Compton*, 1 Sm. L. C. 335.

(*f*) *Eley v. Positive Assurance Co.* 1 Ex. D. 20.

(*g*) The difference arises from the preamble and the enacting part of s. 13 being separately numbered as 13 and 14 in former editions.

5-119) and in Mr. Benjamin's later work (Book 1, Part 2, 72-226) (a). We will here only refer very briefly to the question of what is a sufficient memorandum of a contract within the Statute. Mr. Benjamin exhibits (pp. 161, 167, sqq.) the curious difference in the judicial interpretation of the "agreement" of which a memorandum or note is required by s. 4, and the "bargain" of which a note or memorandum is required by s. 17. The "agreement" of s. 4 includes the consideration of the contract, so that a writing which omits to mention the consideration does not satisfy the words of that section: but the "bargain" of s. 17 does not. So far as regards guaranties, however, this construction of s. 4 having been found inconvenient is excluded by the Mercantile Law Amendment Act 1856, 19 & 20 Vict. c. 97, s. 3, which makes it no longer necessary that the consideration for a "special promise to answer for the debt default or miscarriage of another person" should appear in writing or by necessary inference from a written document (b).

The "note or memorandum."

The note or memorandum under the 4th as well as the 17th section must show what is the contract and who are the contracting parties (c), but it need be signed only by the party to be charged, whether under the 4th or the 17th section: it is no answer to an action on a contract evidenced by the defendant's signature to say that the plaintiff has not signed and therefore could not be sued, and if a written and duly signed proposal is accepted by word of mouth the contract itself is completed by such acceptance and the writing is a sufficient memorandum of it (d). It has also been decided that an acknowledgment of a signature previously made by way of proposal, the document having been altered in the meantime and the party having assented to the alterations, is equivalent to an actual signature of the document as finally settled and as the record of the concluded contract. The signature contemplated by the statute is not the mere act of writing, but the writing coupled with the

(a) For a shorter account see Smith's Merc. Law, 486-500.

(b) See notes to *Birkmyr v. Darnell*, 1 Sm. L. C. 810, *Wain v. Warlters*, 2 Sm. L. C. 241.

(c) *Williams v. Byrnes*, 1 Moo. P. C. N. S. 154, *Newell v. Radford*, L. R. 3 C. P. 52, *Williams v. Jordan*, 6 Ch. D. 517; and as to sufficiency of description otherwise than

by name, *Sale v. Lambert*, 18 Eq. 1, *Potter v. Duffield*, *ib.* 4, *Commins v. Scott*, 20 Eq. 11, *Beer v. London & Paris Hotel Co.* *ib.* 412, *Rossiter v. Miller* (C. A.) 5 Ch. D. 648, *Catling v. King* (C. A.), *ib.* 660.

(d) *Smith v. Neale*, 2 C. B. N. S. 67, 26 L. J. C. P. 143, *Reuss v. Pickaley*, in Ex. Ch. L. R. 1 Ex. 342.

party's assent to it as a signature to the contract: and the effect of the parol evidence in such a case is not to alter an agreement made between the parties but to show what the condition of the document was when it became an agreement between them (*a*). Moreover it matters not for what purpose the signature is added, since it is required only as evidence, not as belonging to the substance of the contract. It is enough that the signature attests the document as that which contains the terms of the contract (*b*). Nor need the particulars required to make a complete memorandum be all contained in one document: the signed document may incorporate others by reference, but the reference must appear from the writing itself and not have to be made out by oral evidence: for in that case there would be no record of a contract in writing, but only disjointed parts of a record pieced out with unwritten evidence (*c*). One who is the agent of one party only in the transaction may be also the agent of the other party for the purpose of signature (*d*). There is considerable authority (though short of an actual decision) for holding that the Statute of Frauds does not apply to deeds. Signature is unnecessary for the validity of a deed at common law, and it is not likely that the legislature meant to require signature where the higher and more formal solemnity of sealing (as it is in a legal point of view) is already present (*e*). But as in practice deeds are always signed as well as sealed, and distinctive seals are hardly ever used except by corporations, the absence of a signature would nowadays add considerably to the difficulty of supporting a deed impeached on any other ground.

Semble,
deeds not
within the
Statute.

Bills of
Sale Acts.

The law as to the sale and disposition of personal chattels is affected, in addition to the Statute of Frauds, by the Bills of Sale Acts, 1854 and 1866, 17 & 18 Vict. c. 36, 29 & 30 Vict. c. 96, and though we do not propose to enter on that subject,

(*a*) *Stewart v. Eddowes*, L. R. 9 C. P. 311.

(*b*) *Jones v. Victoria Graving Dock Co.* 2 Q. B. D. 314, 323. It may be doubted whether this view of the statute does not tend to thrust contracts upon parties by surprise and contrary to their real intention.

(*c*) The last case on this subject

is *Peirce v. Corf*, L. R. 9 Q. B. 210. Cp. *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140.

(*d*) As to this, *Murphy v. Boese*, L. R. 10 Ex. 126.

(*e*) *Cherry v. Heming*, 4 Ex. 631, 19 L. J. Ex. 631. Blackstone (2. 306, and see note in Stephen's Comm., 1. 510, 6th ed.) assumed signature to be necessary.

references to some of the late decisions may perhaps be found useful.

As to the validity of a series of renewed bills of sale, of which only the last is registered : *Burr v. Smale*, L. R. 8 C. P. 64, *Ramsden v. Lupton* (Ex. Ch.) L. R. 9 Q. B. 17. Cp. however *Ex parte Cohen*, 7 Ch. 20, *Ex parte Stevens*, 20 Ex. 786, *Ex parte Furber*, 6 Ch. D. 181.

As to the description of residence and occupation required by s. 1, *Brodrick v. Scalá*, L. R. 6 C. P. 98, *Jones v. Harris*, L. R. 7 Q. B. 157, *Grant v. Shaw*, *ib.* 700, *Larchin v. N. W. Deposit Bank*, L. R. 8, Ex. 80, 10 Ex. 64, in Ex. Ch., *Murray v. Mackenzie*, L. R. 10 C. P. 625, *Smith v. Cheese*, 1 C. P. D. 60.

What is a defeasance or condition within s. 2 : *Ex parte Collins*, 10 Ch. 367.

As to equitable assurances being within the Act, so that an agreement to execute a bill of sale cannot be relied on as an equitable assurance unless registered, *Ex parte MacKay*, 8 Ch. 643, *Ex parte Conning*, 16 Eq. 414.

As to the interpretation clause, s. 7 : "Fixtures:" *Hawtry v. Butlin*, L. R. 8 Q. B. 290, *Ex parte Daglish*, 8 Ch. 1072, *Ex parte Barclay*, 9 Ch. 566, *Meux v. Jacobs*, L. R. 7 H. L. 481.

What acts sufficient to take goods out of the possession or "apparent possession" of the grantor : *Emanuel v. Bridger*, L. R. 9 Q. B. 286, *Pickard v. Marriage*, 1 Ex. D. 364.

"Formal possession:" *Ex parte Jay*, 9 Ch. 697 (a).

Assignee of interest under bill of sale takes subject to his assignor's duty as to registration, and re-registration under the Act of 1866 : *Karet v. Kosher Meat Supply Association*, 2 Q. B. D. 361.

Transfers of British ships are required by the Merchant Ship-Transfers
ping Act 1854 (s. 55 sqq.) to be in the form thereby prescribed. of ships
Assignments of copyright are directly or indirectly required by and copy-
right.
the various statutes on that subject to be in writing (b), and in
the case of sculpture by deed attested by two witnesses (54 Geo.
3, c. 56, s. 4). But we are not aware of anything that makes it
necessary for an executory agreement for an assignment of copy-
right to be in writing. And informal executory agreements for
the sale or mortgage of ships seem now to be valid as

(a) This case and *Ancona v. Rogers*, 1 Ex. D. 285, show that for the purposes of the Act it does not matter whether the possession or apparent possession of the grantor

is with the consent of the true owner or not.

(b) *Leyland v. Stewart*, 4 Ch. D. 419.

between the parties, though under earlier Acts it was otherwise (*a*).

Sale of
horses in
market
overt.

There is "An Act to avoid Horse-stealing" of 31 Eliz. c. 12, which prescribes sundry forms and conditions to be observed on sales of horses at fairs and markets : and "every sale gift exchange or other putting away of any horse mare gelding colt or filly, in fair or market not used in all points according to the true meaning aforesaid shall be void." The earlier Act on the same subject, 2 & 3 Phil. & Mary, c. 7, only deprives the buyer of the benefit of the peculiar rule of the common law touching sales in market overt. These statutes are believed to be in practice inoperative.

Marine
Insurance.

B. Marine Insurances.

By 30 Vict. c. 23, s. 7, marine insurances must (with the exception of insurances against owner's liability for certain accidents) be expressed in a policy.

But the words are not so strict as those of the repealed statutes on the same subject, and the preliminary "slip," which in practice though not in law is treated as the real contract, has for many purposes been recognized by recent decisions. These will be spoken of in another place under the head of Agreements of Imperfect Obligation (chap. XII).

Transfer of
Shares.

C. Transfer of Shares.

There is no general principle or provision applicable to the transfer of shares in all companies. But the general or special Acts of Parliament governing classes of companies or particular companies always or almost always prescribe forms of transfer.

In cost-book mining companies it seems that no particular form is needed, and an executory contract for the sale of shares need not as a rule be in writing. It would be useless to enter here into details : the reader will find full information in Mr. Justice Lindley's treatise, l. 723 sqq.

Assuming joint stock partnerships with transferable shares to be lawful at common law (which is the better opinion) their

(*a*) Maude and Pollock on Merchant Shipping, 3rd ed., pp. 23, note, 33-35. And see the Amendment

Act of 1862, 25 and 26 Vict., c. 63, s. 3.

shares should be transferable without writing in the absence of agreement to the contrary. But for reasons elsewhere given this is now of no practical importance.

D. Acknowledgment of barred debts.

Promise to
pay debt
barred by
Stat. of Li-
mitation.

The operation of the Statute of Limitation, 21 Jac. 1, c. 16 in taking away the remedy for a debt may be excluded by a subsequent promise to pay it, or an acknowledgment from which such promise can be implied. The promise or acknowledgment if express must be in writing and signed by the debtor (9 Geo. 4. c. 14, s. 1) or his agent duly authorized (19 & 20 Vict. c. 97, s. 13). The subject calls for mention here, especially as the promise or acknowledgment is for some purposes a new contract. But we say more of it under the head of Agreements of Imperfect Obligation, Ch. XII. below.

A short account of some of the foreign laws which correspond more or less closely to our Statute of Frauds may perhaps be not without interest.

Foreign
laws ana-
logous to
Stat. of
Frauds.

The projected Civil Code of New York adopts the chief provisions of the Statute of Frauds in terms which to some extent embody the results of leading English decisions (ss. 794, 865, 1537). It has been very justly observed that in England the statute ought to have been repealed and re-enacted half a dozen times to represent the real state of the law.

The Civil Code of Lower Canada, s. 1235, adopts in substance the 17th section as extended by Lord Tenterden's Act. The foundation of Lower Canadian law is French, and the code is in a general way modelled on the Code Napoléon: but this is not the only place in which English law had a marked influence on it.

The French Code (Art. 1341-8) requires an instrument in writing when the subject matter of the contract exceeds the sum or value of 150fr. This is understood (like the 17th section of our statute as distinguished from the 4th) to be a rule of the *lex contractus*, not of the *lex fori*: see the note in Sirey & Gilbert's Codes Annotés. Also compromises must be in writing (Art. 2044).

The Italian Code adds to and modifies this. The general limit of value is fixed at 500 instead of 150 *lire* (Art. 1341). Moreover several particular kinds of contracts have to be in writing, of which the chief are sales of immoveable property, certain contracts as to servitudes and other real rights, leases for more than nine years, grants of annuities, and compromises (Art. 1314). Both in French and in

Italian law the instrument in writing (*acte sousseing privé, scrittura privata*) is of no avail unless signed, and that, it seems, by all parties : moreover there must be actual written signature, not a mark. (Codes Annotés, on Art. 1322 sqq. ; Mazzoni, Diritto Civ. Ital. Bk. 3, Pt. 2. § 171). The only resource of illiterate persons is apparently to call in a notary so as to give the instrument a yet higher degree of solemnity as an "authentic act." And unilateral contracts are subject to certain additional forms.

The Prussian Landrecht (Part. 1. Tit. 5. § 131) requires a writing where the value of the subject matter exceeds fifty thalers.

From the operation of all these laws, however, commercial contracts are excepted : in France (and consequently in Italy) by the construction put in practice upon general words saving the commercial law (*a*), which are held without more to show that the substantive part of the enactment does not apply to anything governed by the Commercial Codes (Codes Annotés, § 3 of note, and Cattaneo & Borda, on Art. 1341 of Fr. & Ital. Codes respectively) : and in Prussia, by the express terms of the German Commercial Code, which it is presumed override the laws of all particular German states (*b*). The last-named Code requires a solemn instrument for the formation of companies (174, 208), and a contract in writing to enable a pledgee to exercise a summary power of sale (310, 311) (*c*).

More strict is the Spanish Código de Comercio (Art. 237) which fixes the value of 1000 reals (= £10 8s. 4d.) as that above which commercial contracts must be in writing : but for the sales in market overt (*ferias y mercados*) the limit is increased to 3000 reals.

The Austrian Civil Code is said to contain no general provision of this kind, but to require forms in several particular cases (Savigny, Obl. 2. 248).

(*a*) Le tout sans préjudice de ce qui est prescrit dans les lois relatives au commerce, Code Civ. 1341 ; the words of the Italian Code are affirmative, but to the same effect.

(*b*) Art. 317. Bei Handelsgeschäften ist die Gültigkeit der

Verträge durch schriftliche Abfassung oder andere Förmlichkeiten nicht bedingt.

(*c*) With leave of the Court obtained *ex parte*, or without it, if there is an express contract to that effect.

CHAPTER IV.

CONSIDERATION.

As regards many if not most of its principles the English law of Contract is founded on or identical with the Roman. But the doctrine of Consideration, at least in the generality of form and application in which we now have it, is believed to be peculiar to England. A good description of the technical meaning of Consideration is to be found in Sir W. D. Evans' appendix to Pothier on Obligations (No. 2): "Any act by which the person making the promise has benefit, or the person to whom it is made has any labour or detriment" (a); and a fuller one has lately been given in the Exchequer Chamber: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other" (b).

Distinction between Eng. Consideration and Roman *Causa*.

In the last chapter we saw that the *causa* which gave validity to such informal contracts as in Roman law were allowed to be valid might perhaps in practice cover approximately the same ground as our *consideration*—that is after the enforceable classes of contracts had been largely extended by the Prætor's Edict and otherwise—but was not the same thing. We also mentioned that this *causa* has persisted in modern French jurisprudence. Here it is greatly extended in its meaning, but yet so as never to coincide with the English term.

(a) Cp. the remarks of the Court in *Edgware Highway Bd. v. Harrow Gas Co.* L. R. 10 Q. B. 92, 95. And see the fuller definition in the Indian Contract Act, already given

in ch. 1.

(b) *Currie v. Misa*, L. R. 10 Ex. at p. 162, per Cur. referring to Com. Dig. Action on the Case, Assumpsit B. 1-15.

Cause in
modern
French
law.

The difference is instructive enough to be worth dwelling upon a little. We read in the French Code Civil, following Pothier: "L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet" (a). Looking at this text alone, nothing would at first sight seem more natural to an English lawyer than simply to translate *cause* by *consideration*. But let him turn to a French commentary on the Code, and he finds no distinct and comprehensive definition of *cause* as a legal term of art, but a scholastic discussion of *efficient*, *final*, and *impulsive* causes (b). Going on to see what is in fact included in the *cause* of the French law, we find it wider than our Consideration in one way and narrower in another. On the one hand the existence of a natural [*i.e.* moral] obligation, or even of a real or supposed duty in point of honour only (c), may be quite enough. Nay, the deliberate intention of conferring a gratuitous benefit, where such intention exists, is a sufficient foundation for a binding unilateral promise: "Dans les contrats de *bienfaisance*, la libéralité que l'une des parties veut exercer envers l'autre est une cause suffisante de l'engagement qu'elle contracte envers elle." (Pothier, *l.c.*) (d). The meaning of *sans cause* seems accordingly to be confined to cases of what we should call total failure (as distinguished from mere absence) of consideration (e). On the other hand there is this limitation, that the promisee must have an interest in the subject-matter of the promise which is apparent and capable of estimation (Pothier §§ 54, 55, 60). This doctrine seems to have arisen from a doubtful extension, if not a misunderstanding, of the technical rules which governed the Roman Stipulation. Of course a contract between A. and B. cannot as a rule give a right of action to C., but the maxim *Alteri stipulari nemo potest* (f) is relied on by French jurisprudence as equivalent to the wider general proposition that a promise by A. to B. to do something for C's

(a) Code Civ. 1131, Pothier Obl. § 42.

(b) Demolombe, Cours du Code Nap. 24. 329.

(c) "Désir de satisfaire aux lois de l'honneur et de la délicatesse." Sirey and Gilbert, Codes Annotés, ad loc.; Demolombe, op. cit. p. 335.

(d) The same in the modern law, see extract from Rogron in Langdell's Sel. Ca. on Cont. 169.

(e) Demolombe, op. cit. p. 342.

(f) D. 45. 1. de v. o. 38, § 17. The rule could always be escaped by inserting a liquidated penal sum payable to the stipulator: a Stipulation thus framed, Will you pay so much to J. S. on such a day? would be naught, but if it ran, Will you pay so much to me if you do not pay J. S. ? it was good enough.

benefit gives no right of action to any one. Pothier puts this case : The owner of a wall opposite my friend's window promises at my request to whitewash it so as to give my friend more light : I cannot sue him for not doing it, though I had promised to pay him for it and should have been liable to pay for the work if done. In English phrase the rule would seem to come to this :—there can be no contract where the nature of the agreement is such that the promisee could recover only nominal damages for a breach of it. But it seems the doctrine is not much favoured, and slight circumstances are laid hold of to exclude its application, *e.g.* a contingent legal liability of the promisee in respect of the subject-matter. The Code (Art. 1119) expresses no more in terms than the Latin maxim, but is of course construed in the same way (*a*). In the Civil Code of Lower Canada, however, we find the English *consideration* introduced, professedly as a synonym of *cause* (ss. 984, 989): it would seem therefore that the English jurisprudence on this point has been there introduced by English lawyers, and has in effect supplanted the French by its greater convenience and simplicity.

Notwithstanding these differences it seems very possible that the English Consideration may be directly descended from the Roman *Causa*. The Roman theory whether in its classical or in its modern shape falls short of the completeness and common sense of our own ; but only one step seems wanting (*b*). If the Roman lawyers or the civilians in modern times had ever fairly asked themselves what were the common elements in the various sets of facts which under the name of *causa* made various kinds of contracts actionable, they could scarcely have failed to extract something equivalent to our Consideration.

History of the English conception : it may be derived from the Roman, notwithstanding differences.

The fact that they did not take that step is much more difficult to account for than the fact, if a fact it be, that we did. But the history of the English doctrine is obscure, at least the present writer has found it so. The most we can affirm is that the general idea was formed somewhere in the latter part of the

(*a*) Codes Annotés, ad loc. ; Demolombe, op. cit. p. 198.

(*b*) Ulpian once comes near to

taking it : D. 19. 5. de præscr. verbis, 15 ; Hunter's Roman Law, 373.

fifteenth century ; that at the same time or a little later *nudum pactum* lost its ancient meaning, (*viz.* an agreement not made by specialty so as to support an action of covenant, or falling within one of certain classes so as to support an action of debt) and came to mean what it does now ; and that the *word* Consideration in the sense now before us came into use, at least as a settled term of art, still later. It is hardly needful to mention that in the early writers *Considerare*, *Consideratio* always mean the judgment of a court : this usage has been preserved down to our own time in the judgments of the common law courts in the form "It is considered."

Case in 37
H. 6.

The early cases of actions of assumpsit, of which we gave a specimen in the last chapter, show by negative evidence which is almost conclusive that in the first half of the 15th century the doctrine of Consideration was quite unformed. But in 1459 we find a great advance in a case to which we have already referred as showing that an action of debt would then lie on any consideration executed. The case was this : Debt in the Common Pleas on an agreement between the plaintiff and defendant that plaintiff should marry one Alice, the defendant's daughter, on which marriage defendant would give plaintiff 100 marks. Averment that the marriage had taken place and the defendant refused to pay. Danvers, J. said : "The defendant has *Quid pro quo* : for he was charged with the marriage of his daughter and by the espousals he is discharged, so the plaintiff has done what was to be paid for. So if I tell a man, if he will carry twenty quarters of wheat of my master Prisot's to G., he shall have 40s., and thereupon he carry them, he shall have his action of debt against me for the 40s. ; *and yet the thing is not done for me, but only by my command* : so here he shows that he has performed the espousals, and so a good cause of action has accrued to him : otherwise if he had not performed them" (a). Moile, J. agreed : Prisot, C. J. and Danby, J. thought such an action not maintainable except on a specialty, and an objection was also taken to the jurisdiction on the ground of marriage being a spiritual matter (cp. p. 143 *supra*) : the case was adjourned and the result is not stated. It is pretty clear however that Danvers at any rate had grasped the leading and

(a) M. 37 H. 6. 8, pl. 18.

characteristic point of the modern learning of Consideration—namely that when a thing is done at a man's request the law does not ask whether it is for his apparent benefit, but takes it as against him to be of the value he has himself chosen to put upon it. The word is not here used, but the thing is expressed by *Quid pro quo*: so it is in another curious case of the same year, where a bond given for an assignment of debts was decreed in Chancery to be cancelled, for the reason that no duty (a) was vested in the assignee by the assignment, so that he had not *Quid pro quo* for his bond. Whence it seems that an assignment of debts was not then recognized as creating any right which could be enforced in equity (b). Some time later we find the principle expressed thus: If I promise J. S. a certain sum for the commons [board] of J. D. an action of debt lies for this, “car la ley intend que J. S. est un tial per que service jeo aie advantage” (c). In the Doctor and Student (A.D. 1530) we find substantially the modern doctrine, though this last point is not particularly mentioned. The following passage shows that the notion of *nudum pactum* was then completely transformed:—

And a nude or naked promise is where a man promiseth another to give him certain money such a day, or to build an house, or to do him such certain service, and nothing is assigned for the money, for the building, nor for the service; these be called naked promises because there is nothing assigned why they should be made; and I think no action lieth in those cases, though they be not performed. (Dial. 2, c. 24). Doctor and Student.

Not many lines below this passage the word Consideration is used, but in such a way as to make it probable that the writer did not regard it as a technical term. But so far as we know the first full discussion of Consideration by that name is in Plowden's report of *Sharington v. Strotton* (Mich. 7 & 8 Eliz.) (d). The question in the case was whether natural love and affection was a good consideration to support a covenant to stand seised to uses. The action was trespass, and the defendants justified as servants of parties entitled under the covenant. Arguments in Sharington v. Strotton, Mich. 7 & 8 Eliz.

(a) *Sic* in the book: the word is here and elsewhere used with a double aspect, like *obligatio*, as *debt* still is.

(b) Hil. 37 H. 6, 13, pl. 3.

(c) 1 Rol. Ab. 593, pl. 7, citing 17 E. 4. 5; and see other cases and dicta there collected.

(d) Plowd. 298, 302.

The argument for the plaintiffs insists on "value or recompence" as the essence of Consideration, and shows a full understanding of the law in its modern sense. Among other cases marrying the promisor's daughter at his request is put as a good consideration. The argument for the defendants is long and desultory and goes into much irrelevant matter about Aristotle, the utility of marriage, and the Law of Nature: and the notion is brought in that the consideration for a promise must show some apparent benefit to the promisor: it is said that a promise to pay money in consideration of marriage, such as above mentioned, would be *nudum pactum* but for regard to Nature (*a*). It is also said that every deed imports a consideration, *viz.* the will of him that made it. But this seems a desperate argument. For it must be remembered that the common law rule of a deed wanting no consideration at all was inapplicable (*b*). Before the Statute of Uses a merely gratuitous agreement or declaration of uses without any transfer of legal possession was ineffectual to create a use even if made by deed: and the Statute executes a legal estate only where before the Statute there would have been a use enforceable in equity. In the result the Court held that the covenant was effectual to transfer the use, natural love and affection being a sufficient consideration to support it. It does not appear whether they were prepared to go the whole length of the argument for the defendants and hold natural love and affection a good consideration for contracts of all sorts.

True origin
of the doc-
trine per-
haps in
equity.

As is well shown by this case, the question of Consideration was of importance in the learning of Uses before the statute, (and there is nothing but the precautions embodied in the settled practice of conveyancers to prevent it from being so now, as indeed it might still be, in spite of those precautions, in exceptional cases). And the reflection is obvious that both the general conception and the name of Consideration may well have had their origin in the Court of Chancery and the law of Uses, and have been thence imported into the law of contracts rather than developed by the common law courts. On this hypothesis the connexion with the Roman *causa* would if anything be

(*a*) It is curious that the case was argued on principle without any reference to precedents in the Court of Chancery. It can scarcely have been of first impression.

(*b*) The passage is cited in some modern books as an illustration of or authority for that rule, but manifestly *per incuriam*.

more likely than on the other. A more complete search than we have been able to make might perhaps be rewarded by the discovery of positive evidence on this point.

It was the work of a very long time to settle the doctrine in all points as we now have it. A curious illustration of the extent to which it was left open even in the last century is furnished by *Pillans v. Van Mierop* (a). The actual decision was on the very sound principle (characteristic, as we have seen, of our law) that "any damage to another or suspension or forbearance of his right is a foundation for his undertaking and will make it binding, though no actual benefit accrues to the party undertaking" (b). But Lord Mansfield threw out the suggestion (which Wilmot, J. showed himself inclined to follow, though not wholly committing himself to it) that there is no reason why agreements *in writing*, at all events in commercial affairs, should not be good without any consideration. "A *nudum pactum* does not exist in the usage and law of merchants. I take it that the ancient notion about the want of consideration was for the sake of evidence only . . . in commercial cases amongst merchants the want of consideration is not an objection" (c). It is true that this was and has remained a solitary dictum barren of results; its anomalous character was rightly seen at the time and it has never been followed; but the fact that such an opinion could be expressed at all from the bench is sufficiently striking. This suggestion of setting up a new class of Formal Contracts (for such would have been the effect) came, as it was, too late to have any practical influence. But if it had occurred a century or at any rate two centuries earlier to a judge of anything like Lord Mansfield's authority, the whole modern development of the English law of contract might have been changed, and its principles might have been (with only minute theoretical differences) assimilated to those of the law of Scotland.

At least one other point of great importance remained open even in practice down to a much later time. The anomalous doctrine that the existence of a previous moral obligation is enough to support an express promise was held by eminent

Fluctuations in the doctrine in modern times. *Pillans v. Van Mierop*.

Promises founded on moral duty: supposed binding till

(a) 3 Burr. 1664.

(b) Per Yates, J. at p. 1674.

(c) 3 Burr. 1669-70.

Eastwood v. Kenyon. judges a few generations back, and was overruled only in 1840 by the decision of the Exchequer Chamber that "a mere moral obligation arising from a past benefit not conferred at the request of the defendant" is not a good consideration (a).

Adequacy of consideration not inquired into. It is a corollary from the rule above shown to be a distinguishing mark of English jurisprudence that the amount of the consideration is not material. "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give" (b).

It is accordingly treated as an "elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration" (c). This is of long standing, and illustrated by many cases. "When a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action" (d). The following are modern examples. If a man who owns two boilers allows another to weigh them, this is a good consideration for that other's promise to give them up after such weighing in as good condition as before. "The defendant" said Lord Denman "had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive" (e). So parting with the possession of a document, though it had not the value the parties supposed it to have (f), and the execution of a deed (g), though invalid for want of statutory requisites (c), have been held good considerations. In the last mentioned case the justice of the decision was very plain: the deed was an apprenticeship indenture which omitted to set forth particulars required by the statute of Anne then in force (h): the apprentice had in fact served his time, so that

(a) *Eastwood v. Kenyon*, 11 A. & E. 438, 446.

(b) Hobbes, *Leviathan*, pt. 1. c. 15.

(c) *Westlake v. Adams*, 5 C. B. N. S. 248, 265, 24 L. J. C. P. 271, per Byles, J.

(d) *Sturlyn v. Ablany*, Cro. Eliz. 67, and see Cro. Car. 70, and marginal references there.

(e) *Bainbridge v. Firmstone*, 8

A. & E. 743.

(f) *Haigh v. Brooks* (Q. B. and Ex. Ch.), 10 A. & E. 309, 320, 334. Or letting the promisor retain possession of a document to which the promisee is entitled: *Hart v. Miles*, 4 C. B. N. S. 371, 27 L. J. C. P. 218.

(g) *Cp. Jones v. Waite*, 9 Cl. and F. 101.

(h) 8 Ann. c. 5 (9 in Ruffh.) rep.

the benefit of the consideration had been fully enjoyed. In like manner a licence by a patentee to use the patented invention is a good consideration though the patent should turn out to be invalid (*a*). In a late case in the Supreme Court of the United States a release of a supposed right of dower, which the parties thought necessary to confirm a title, was held a good consideration for a promissory note (*b*). Decided cases in equity to the same effect are not wanting. It has been held that a transfer of railway shares on which nothing has been paid is a good consideration (*c*); and that if a person indebted to a testator's estate pays the probate and legacy duty on the amount of the debt, this is a good consideration for a release of the debt by the residuary legatees (*d*): a strong case, for this view was an after-thought to support a transaction which was in origin and intention certainly gratuitous, and in substance an incomplete voluntary release; the payment was simply by way of indemnity, it being thought not right that the debtor should both take his debt out of the estate and leave the estate to pay duty on it. The consent of liquidators in a voluntary winding-up to a transfer of shares is a good consideration for a guaranty by the transferor for the payment of the calls to become due from the transferee (*e*). An agreement to continue—*i.e.* not to determine immediately—an existing service terminable at will, is likewise a good consideration (*f*). The principle of all these cases may be summed up in the statement made in so many words by the judges in more than one of them, that the promisor has got all that he bargained for. There has been another rather peculiar case in equity which was to this effect. An agreement is made between a creditor, principal debtor, and surety under a continuing guaranty, by which no new undertaking is imposed on the surety, but additional remedies are given to the creditor, which he is to enforce if requested to do so by the surety. Held that if by his own

Inland Revenue Repeal Act 1870, 33 & 34 Vict. c. 99. See now the Stamp Act 1870, 33 & 34 Vict. c. 97, s. 40.

(*a*) *Lawes v. Purser*, 26 L. J. Q. B. 25.

(*b*) *Sykes v. Chadwick*, 18 Wallace 141.

(*c*) *Cheale v. Kenward*, 3 De G.

& J. 27.

(*d*) *Taylor v. Manners*, 1 Ch. 48, by Turner, L. J. *dub.* Knight Bruce L. J.

(*e*) *Cleve v. Financial Corporation*, 16 Eq. 363, 375.

(*f*) *Gravelly v. Barnard*, 18 Eq. 518.

Same rule
in equity.

Consideration may be contingent.

negligence the creditor deprives himself of the benefit of these remedies, the surety is discharged. The real meaning of what is there said about consideration seems to be that as between the creditor and the surety it is not material (a). Closely connected in principle with the foregoing class of cases, though not identical with them, is the rule that the consideration for a promise may well be contingent, that is, it may consist in the doing of something by the promisee which he need not do unless he chooses, but which being done by him the contract is complete and the promise binding. If a tradesman agrees to supply on certain terms such goods as a customer may order during a future period, he cannot sue the customer for not ordering any goods, but if the customer does order any the condition is fulfilled, the consideration is perfected, and there is a complete contract which the seller is bound to perform (b).

Inadequacy plus other things in Equity: see chap. XI.

Inadequacy of consideration coupled with other things may however be of great importance as evidence of fraud, &c., when the validity of a contract is in dispute: and it has been considered (though, it is believed, the better opinion is otherwise) to be of itself sufficient ground for refusing specific performance. This subject, which is by no means free from difficulty, will be examined under the head of Undue Influence, Ch. XI., *post*.

Reciprocal promise as consideration. Must be possible: *qu.* extent of rule.

Reciprocal promises may be and in practice constantly are the consideration for one another, and so constitute a binding contract. It is said that in order to be a good consideration a promise must be a promise to do something which the promisor has the means of performing; but this proposition, though affirmed by an authority little short of judicial (c), seems unwarrantably wide. The true limitation, it is submitted, is that the thing promised must be *in itself* possible, and such as the promisor is *legally* competent to perform; this last point is what

(a) *Watson v. Allcock*, 4 D. M. G. 242. The guaranty was determinable by notice from the surety, and it was suggested by way of supplying a new consideration that on the faith of the creditor's increased remedy the surety might in fact have abstained from determining it. But surely this will not do: the

true ground is the creditor's original duty to the surety, which covers subsequently acquired rights and remedies.

(b) *G. N. Ry. Co. v. Witham*, L. R. 9 C. P. 16. *Contra* a recent case in New York (*Benjamin on Sale*, 55).

(c) 2 Wms. Saund. 430.

the cases cited for the general statement really go to show, though certainly there are some dicta much more largely expressed (a). In this form the proposition is completely covered by the general law touching impossible and unlawful agreements, and we know of nothing that requires us to lay down any wider rule as part of the distinct learning of Consideration. There is certainly no general rule that a promise cannot be sued on unless the promisor had in fact the means of performing it when he made it; and if we say that the undertaking of a legal liability is not to be deemed a consideration unless the liability be substantial, we are in truth setting up in another shape the often exploded supposition that the adequacy of the consideration can be inquired into.

It is certain however that a promise which is to be a good consideration for a reciprocal promise must be such as can be enforced: it must therefore be not only lawful and in itself possible, but reasonably definite. Thus a promise by a son to his father to leave off making complaints of the father's conduct in family affairs is no good consideration to support an accord and satisfaction, for it is too vague to be enforced (b). And upon a conveyance of real estate without any pecuniary consideration a covenant by the grantee to build on the land granted such a dwelling-house as he or his heirs shall think proper is too vague to save the conveyance from being voluntary within 27 Eliz. c. 4 (c).

For the same reason, neither the promise to do a thing nor the actual doing of it will be a good consideration if it is a thing which the party is already bound to do either by the general law or by a subsisting contract with the other party (d).

Must be enforce-able.

Must not be of a thing one is already bound generally

(a) *Haslam v. Sherwood*, 10 Bing. 540, *Nerot v. Wallace*, 3 T. R. 17, where the dicta of Lord Kenyon, C. J. and Ashhurst, J. are those meant in the text. Buller and Grose, JJ. confined their judgments to the true ground of the case, viz. that the agreement then in question was illegal as being against the policy of the bankrupt laws.

(b) *White v. Bluet*, 23 L. J. Ex. 36: this seems the *ratio decidendi*, though so expressed only by Parke,

B. who asked in the course of argument, "Is an agreement by a father in consideration that his son will not bore him a binding contract?"

(c) *Rosher v. Williams*, 20 Eq. 210.

(d) See Leake, 318-320; and, besides authorities there given, *Deacon v. Gridley*, 15 C. B. 295, 24 L. J. C. P. 17, and the judgment on the 7th plea in *Mallatieu v. Hodgson*, 16 Q. B. 689, 20 L. J. Q. B. 339.

or to the
promisee
to do.

It is obvious that an express promise by A. to B. to do something which B. can already call on him to do can (at any rate in contemplation of law) produce no fresh advantage to B. or detriment to A. But the doing or undertaking of anything beyond what one is already bound to do, though of the same kind and in the same transaction, is a good consideration. A promise of reward to a constable for rendering services beyond his ordinary duty in the discovery of an offender is binding (a): so is a promise of extra pay to a ship's crew for continuing a voyage after the number of hands has been so reduced by accident as to make the voyage unsafe, so that the crew are not bound to proceed under their original articles (b). Again there will be consideration enough for the promise if an existing right is altered or increased remedies given. Thus an agreement to give a debtor time in consideration of his paying the same interest that the debt already carries is inoperative, but an agreement to give time or accept reduced interest in consideration of having some new security would be good and binding. The common proviso in mortgages for reduction of interest on punctual payment—i.e. payment at the very time at which the mortgagor has covenanted to pay it—seems to be without any consideration, and it is conceived that if not under seal such a proviso could not be enforced (c). Again the rule does not apply if the promise is in the nature of a compromise, that is if a reasonable doubt exists at the time whether the thing promised be already otherwise due or not, though it should be afterwards ascertained that it was so. The reason of this will be more conveniently explained, so far as it needs explanation, when we speak presently of forbearance as a Consideration.

But may
be of a
thing one
is bound
to a third
person to
do.

In the case where the party is already bound to do the same thing, but only by contract with a third person, there is some difference of opinion. But there seems to be no solid reason why the promise should not be good in itself, and therefore a good consideration. It creates a new and distinct right, which must always be of some value in law, and may be of

(a) *England v. Davidson*, 11 A. & E. 856.

(b) *Hartley v. Ponsonby*, 7 E. & B. 872, 26 L. J. Q. B. 322.

(c) This could be at once pro-

vided against, however, if so desired, by fixing the times for "punctual payment" a single day earlier than those named in the mortgagor's covenant.

appreciable value in fact. There are many ways in which B. may be very much interested in A.'s performing his contract with C., but yet so that the circumstances which give him an interest in fact do not give him any interest which he can assert in law. It may well be worth his while to give something for being enabled to insist in his own right on the thing being done. This opinion has been expressed and acted on in the Court of Exchequer (a), and seems implied in the judgment of the majority of the Court of Common Pleas in a case decided some weeks earlier (b), which affords a curious modern example of a class of agreements already mentioned as having in former times given rise to much litigation and even to conflicts of jurisdiction. An uncle wrote to his nephew in these terms: "I am glad to hear of your intended marriage with E. N.; and as I promised to help you at starting I am happy to tell you that I will pay to you one hundred and fifty pounds yearly during my life," subject to a contingency not material to be now stated. The marriage took place, and for several years this annuity was paid; after which it fell into arrear, the uncle died, and the nephew sued his executors. It was pleaded amongst other things that the marriage was not at the testator's request and that there was no consideration for the promise. Erle, C. J. and Keating, J. held (but without saying in terms that the existence of the engagement to marry at the date of the uncle's promise could make no difference) that on the whole the marriage must be taken to have been at the testator's request, and so was a sufficient consideration. Byles, J. dissented, thinking that as no express request appeared, so none could be implied, for the nephew was already bound to the marriage and the uncle knew it: he stated the rule to be that a promise to do what one is already bound, though only to a third person, to do, cannot be a consideration (c); and he seemed disposed to treat it as a matter of public policy. Unless put on that ground, indeed, it would amount, as was pointed out in the Exchequer (d), to saying that a man cannot

(a) *Scotson v. Pegg*, 6 H. & N. 295, 30 L. J. Ex. 225.

(b) *Shadwell v. Shadwell*, 9 C. B. N. S. 159, 30 L. J. C. P. 145.

(c) And so thought some of the judges in *Jones v. Waite*, 5 Bing. N. C. 341, 351, 356. But the actual decision there (*ib.*, 9 CL & F. 101)

would be a clear authority the other way, had it not been assumed at the time that an agreement to execute a separation deed could not be directly enforced.

(d) Per Wilde, B. *Scotson v. Pegg*, *supra*.

have an interest in the performance of a contract made with another.

But even if we do regard it as a rule of law paramount to the interest of the parties—a view for which it may be said that as a matter of fact an individual citizen might often find it less troublesome to pay a man for performing his legal duty than to take the proper steps for making him perform it—there still appears to be good reason for the distinction. To allow promises to be binding if made in consideration of the promisee doing or undertaking what he is already bound generally or to the promisor to do would be to give direct encouragement to breaches of public and private duty. But where the duty is to a third person only, this reason does not apply; the encouragement to unlawful conduct, if any, is too remote and precarious to count for anything.

Rules as to consideration extended to the discharge of contracts.

The doctrine of Consideration, especially this last part of it, has been extended with not very happy results beyond its proper scope, which is to govern the formation of contracts, and has been made to regulate and restrain the discharge of contracts. For example, where there is a contract of hiring with a stipulation that the wages due shall be forfeited in the event of the servant being drunk, a promise not under seal to pay the wages notwithstanding a forfeiture is not binding without a new consideration (a). But it is thought unnecessary to enter here on this matter, which the reader will find set forth in the notes to *Cumber v. Wane* (b). It is enough to say that English common law stands committed to the absurd paradox that a debt of 100*l.* may be perfectly well discharged by the creditor's acceptance of a peppercorn at the same time and place at which the 100*l.* are payable or of ten shillings at an earlier day or at another place, but that nothing less than a release under seal will make his acceptance of 99*l.* in money at the same time and place a good discharge (c): although modern decisions have confined this absurdity within the narrowest possible limits (b).

(a) *Monkman v. Shepherdson*, 11 A. & E. 411.

(b) 1 Sm. L. C. 341 sqq., see the existing law summed up, pp. 351-356.

(c) *Pinnel's* ca. 5 Co. Rep. 117. The Indian Contract Act (s. 63, illust. b) is accordingly careful to

express the contrary. The rule in *Pinnel's* case, it may be noted, though paradoxical, is not *anomalous*. It is the strictly logical result of carrying out a general principle beyond the bounds within which it is reasonably applicable.

If it is agreed between creditor and debtor that the duty shall be performed in some particular way different from that originally intended, this may well be binding: for the creditor's undertaking to do something different though only in detail from what he at first undertook to do, or even relinquishing an option of doing it in more ways than one, would be consideration enough, and the Court could not go into the question whether it gave any actual advantage to the creditor. But if the new agreement amounts to saying that the debtor shall at his own option perform the duty as at first agreed upon or in some other way, it cannot be binding without a new consideration: as where an entire sum is due, and there is an agreement to accept payment by instalments, this would be good, it seems, if the debtor undertook not to tender the whole sum: but in the absence of anything to show such an undertaking, the agreement is a mere voluntary indulgence, and the creditor remains no less at liberty to demand the whole sum than the debtor is to pay it (a).

The consideration for variation of contracts.

The loss or abandonment of any right, or the forbearance to exercise it for a definite or ascertainable time, is for obvious reasons as good a consideration as actually doing something. In *Mather v. Lord Maidstone* (b) the loss of collateral rights by the promisee supported a promise notwithstanding that the main part of the consideration failed. The action was on a bill of exchange. This bill was given and indorsed to the plaintiff as in renewal of another bill purporting to be accepted by the defendant and indorsed to the plaintiff. The plaintiff gave up this first bill to the defendant; thirty days afterwards it was discovered that it was not really signed by the defendant: yet it was held that he was liable on the second bill, for the plaintiff had lost his remedy against the other parties to the first bill during the time for which he had parted with the possession of it, and that was consideration enough.

Loss or forbearance of rights as consideration.

As to forbearance, the commonest case of this kind of consideration is forbearing to sue. The forbearance or promise of it must be, as we said, for a definite or ascertainable time in

Forbearance to sue: must be for definite or

(a) *McManus v. Bark*, L. R. 5 Ex. 65. (b) 18 C. B. 273, 25 L. J. C. P. 300.

ascertain-
able time.

order to be a good consideration. Forbearance for a reasonable time is enough, for it can be ascertained as a question of fact what is a reasonable time in any given case: and an undertaking in terms which are in themselves vague, such as "forbearing to press for immediate payment" may be construed by help of the circumstances and context as meaning forbearance for a reasonable time (a).

There
must be an
actual or
bona fide
disputed
right.

That which is forborne must also be the exercise or enforcement of some legal or equitable right which is at least reasonably believed to exist (b). This is simply the converse of a rule already given. As a promise by A. to B. is naught if it is only a promise to do something A. is already bound, either absolutely or as against B., to do, so it is equally worthless if it is a promise not to do something which B. can already, as a matter either of public or of private right, forbid A. to do. Such is the theoretical expression of the rule, if we assume the existing rights of the parties to be known: but as in practice they often are not known, but depend on questions of law or of fact, or both, which could not be settled without considerable trouble, common sense and convenience require that compromises of doubtful rights should be recognized as binding, and they constantly are so recognized. Unless we chose to treat these as an exception, which would be absurd, the statement must be modified thus—A promise by A. to B. not to do some thing or to prosecute some claim is not a good consideration if A. knows that the thing is one which B. can already forbid him to do, or that the claim has no foundation. One might be tempted to add, or if by reasonable diligence he might know: but it is more probable that in this as in certain other analogous questions the existence of means of knowledge is material only as evidence of actual knowledge. "Every day a compromise is effected on the ground that the party making it [a doubtful claim] has a chance of succeeding in it, and if he *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing and

Why com-
promises
are bind-
ing.

(a) *Oldershaw v. King* (Ex. Ch.) 2 H. & N. 517, 27 L. J. Ex. 120, and see 1 Wms. Saund. 225. The case of *Alliance Bank v. Broom*, 2 Dr. & Sm. 289, which at first sight looks like a decision that a promise

to forbear suing for no time in particular is a good consideration, is perhaps to be supported on this ground.

(b) *Leake* 327-30.

his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action and the other party gets an advantage It would be another matter if a person made a claim which he knew to be unfounded and by a compromise derived an advantage under it: in that case his conduct would be fraudulent" (a).

This rule applies in the case (which apart from authority might possibly seem doubtful) where the claim given up is on a disputed promise of marriage (b). The real consideration and motive of a compromise, as well in our law as in the civil law and systems derived from it, is not the sacrifice of a right but the abandonment of a claim (c). A partial compromise in which the undertaking is not simply to stay or not to commence legal proceedings, but to conduct them in some particular manner or limit them to some particular object, may well be good: but here again the forbearance must relate to something within the proper scope of such proceedings. A promise to conduct proceedings in bankruptcy so as to injure the debtor's credit as little as possible is no consideration, for it is in truth merely a promise not to abuse the process of the Court (d).

The main end and use of the doctrine of Consideration in our modern law, whatever may have been its precise origin, is to furnish us with a reasonable and comprehensive set of rules which can be applied to all informal contracts without distinction of their character or subject-matter. Formal contracts remain, strictly speaking, outside the scope of these rules, which were not made for them, and for whose help they had no need. But it was impossible that so general and so useful a legal conception as that of Consideration should not make its way into the treatment of formal contracts, though with a different aspect. The ancient validity of formal contracts could not be amplified, but it might be restrained: and in fact both the case-law and the legislation of modern times shew a marked tendency to cut short if not to abolish their distinctive privileges, and to extend to them as much as possible the free and rational treatment of legal

Reaction
of the ge-
neral doc-
trine of
Considera-
tion on
contracts
under seal.

(a) *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449, 452, per Cockburn, C. J.

(b) *Keenan v. Handley*, 2 D. J. S. 283.

(c) *Trigge v. Lavallée*, 15 Moo.

P. C. 271, 292 (a case from Lower Canada, then under old Fr. law);

Wilby v. Elgee, L. R. 10 C. P. 497.

(d) *Bracewell v. Williams*, L. R. 2 C. P. 196.

questions which has been developed in modern times by the full recognition of informal transactions.

Most conspicuous in Equity.

There is some reason, as we have seen, to believe that the doctrine of Consideration owes its origin to the Court of Chancery : and we must still look to courts of equity to see it in its fullest application. A merely gratuitous contract under seal may be enforced at law (with some peculiar exceptions) unless it can be shown that behind the apparently gratuitous obligation there is in fact an unlawful or immoral consideration : and with its strictly legal effect, in the absence of any special ground of invalidity, the rules of equity do not profess to interfere. But courts of equity refuse to extend their special protection and their special remedies to agreements, however solemn and formal, made without consideration.

No specific performance of voluntary agreement though by deed.

A voluntary covenant, though under seal, "in equity, where at least the covenantor is living, or where specific performance of such a covenant is sought, . . . stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed" (a).

Even the first part of our statement must be taken with a qualification of some importance to which allusion is made in the passage just cited. We shall see under the head of Undue Influence that a system of presumptions has been established which makes it difficult in many cases for persons claiming under a voluntary deed to uphold its validity if the donor, or even his representatives, choose within any reasonable time afterwards to dispute it. The rule that a court of equity will not grant specific performance of a gratuitous contract is so well settled that it is needless to cite further authorities for it : and it is not to be overlooked that whereas the other rules that limit the application of this peculiar remedy are of a more or less discretionary kind, and founded on motives of convenience and the practical requirements of procedure rather than on legal principle, this is an absolute and unqualified rule which must be considered as part of the substantive law.

(a) Per Knight Bruce, L. J. 176, 188.
Kekewich v. Manning, 1 D. M. G.

It is the practice of equity, however, at all events when the want of consideration is actively put forward as an objection (and the practice must be the same, it is conceived, when the objection is made by way of defence in an action for specific performance) to admit evidence of an agreement under seal being in fact founded on good consideration, where the deed expresses a nominal consideration (a) or no consideration at all (b), though (save in a case of fraud or illegality) a consideration actually inconsistent with that expressed in the deed could probably not be shown (a). But existence of consideration may be shown *aliunde*.

Closely connected with this in principle is the rule of equity that although no consideration is required for the validity of a complete declaration of trust, or a complete transfer of any legal or equitable interest in property, yet an incomplete voluntary gift creates no right which can be enforced. Certain recent decisions have indeed shown a tendency to infringe on this rule by construing the circumstances of an incomplete act of bounty into a declaration of trust, notwithstanding that the real intention of the donor was evidently not to make himself a trustee, but to divest himself of all his interest (c). But these have been disapproved in still later judgments which seem entitled to more weight (d). Equity won't give effect to imperfect gifts.

(a) *Leifchild's ca.* 1 Eq. 231.

(b) *Llanelly Ry. & Dock Co. v. L. & N. W. Ry. Co.* 8 Ch. 942.

(c) *Richardson v. Richardson*, 3 Eq. 686, *Morgan v. Malleon*, 10 Eq.

475.

(d) *Warriner v. Rogers*, 16 Eq. 340, *Richards v. Delbridge*, 18 Eq. 11, *Moore v. Moore*, *ib.* 474, *Heartley v. Nicholson*, 19 Eq. 233.

CHAPTER V.

PERSONS AFFECTED BY CONTRACT.

Part 1.—General Rules as to Parties.

Original
type of
contract.

The original and simplest type of contract is an agreement creating an obligation between certain persons. The persons are ascertained by their description as individuals, and not by their satisfying any general class description: or, more shortly, they are denoted by proper names and not by class-names (*a*). And the persons who become parties in the obligation created by the agreement are the persons who actually conclude the agreement in the first instance, and those only. The object of this chapter will be to point out the extent to which modern developments of the law of contract have altered this primary type either by modifications co-extensive with the whole range of contract or by special classes of exceptions.

The fundamental notion from which we must take our departure is one that our own system of law has in common with the Roman system and the modern law of other civilized countries derived therefrom. There is some evidence that we ourselves got this (together with other principles of the law of contract) from Roman sources. However that may be, we find it as firmly established in our own system as in the Roman from a very early date, though it happens not to be definitely expressed in a general form in any of our authorities. A wide statement of the principle may be given in the shape of a maxim thus:

(*a*) Savigny, *Obl.* § 53 (2. 16), cp. rally, *ib.* §§ 53-70, pp. 17-186.
on the subject of this chapter gene-

The legal effects of a contract are confined to the contracting parties.

Legal effects confined to contracting parties.

This, like most if not all legal maxims, is a generalization which can be useful only as a compendious symbol of the particulars from which it is generalized, and cannot be understood except by reference to those particulars. The first step towards the necessary development may be given in a series of more definite but still very general rules, which we shall now endeavour to state, embodying at the same time those qualifications, whether of recent introduction or not, which admit of being stated in an equally general form.

This maxim to be developed.

We give some preliminary definition of terms which it will be convenient to use in extended or special senses. A contract creates an obligation between the contracting parties, consisting of duties on the one part and the right to demand the performance of them on the other.

Definitions.

Any party to a contract, so far as he becomes entitled to have anything performed under the contract, is called the creditor. So far as he becomes bound to perform anything under the contract he is called the debtor.

"Creditor" and "debtor."

Representation, representatives, mean respectively succession and the person or persons succeeding to the general rights and liabilities of any person in respect of contracts whether by reason of the death of such person or otherwise. A *third person* means any person other than one of the parties to the contract or his representatives (a).

"Representation."

"Third person."

Rules. 1. The original parties to a contract must be persons ascertained at the time when the contract is made.

Rules. Parties.

2. The creditor can demand performance from the debtor or his representatives. He cannot demand nor can the debtor require him to accept performance from any third person: but the debtor or his representatives may perform the duty by an agent.

Third persons not bound.

(a) Contracts for the sale of land are enforceable in equity by and against the heirs or devisees of the parties. But here the obligation is treated as attached to the particular property.

Third person not entitled.

3. No third person can become entitled by the contract itself to demand the performance of any duty under the contract.

Exception. Provisions contained in a settlement made upon and in consideration of marriage for the benefit of children to be born of such marriage, or, in the case of a woman marrying again, for the benefit of her children by any former marriage, may be enforced by the persons entitled to the benefit thereof (a).

Assignment.

4. Persons other than the creditor may become entitled by representation or assignment to stand in the creditor's place and to exercise his rights under the contract.

Notice to debtor.

Explanation 1. Title by assignment is not complete as against the debtor without notice to the debtor, and a debtor who performs his contract to the original creditor without notice of any assignment by the creditor is thereby discharged.

Equities.

Explanation 2. The debtor is entitled as against the representatives and, unless a contrary intention appears by the original contract, as against the assignees of the creditor, to the benefit of any defence which he might have had against the creditor himself.

(The following exceptions are given in order to complete the general statement. The further discussion of them however would not be relevant to the subject of this chapter. They are connected in principle with the cases of a contract for personal services or the exercise of personal skill becoming impossible of performance by inevitable accident, of which we speak in Ch. VII. below.)

Exceptions: Strictly personal duties.

Exception 1. If it appears to have been the intention of the parties that the debtor should perform any duty in person, he cannot perform it by an agent nor can performance of it be required from his representatives. Such an intention is presumed in the case of any duty which involves personal confidence between the parties, or the exercise of the debtor's personal skill.

Strictly personal rights.

Exception 2. If it appears to have been the intention of the parties that only the creditor in person should be entitled to have any duty performed, no one can become entitled by representa-

(a) See p. 194 below.

tion or assignment to demand the performance of it, nor can such performance be required from the debtor's representatives.

Such an intention is presumed if the nature of the transaction involves personal confidence between the parties, or is otherwise such that "personal considerations" are of the foundation of the contract (a). (Cp. Indian Contract Act 1872, ss. 37, 40.)

Exception 3. The representatives of a deceased person cannot sue for a breach of contract in a case where the breach of contract was in itself a merely personal injury, unless special damage to the estate which they represent has resulted from such breach of contract. But where such damage has resulted the representatives may recover compensation for it, notwithstanding that the person whose estate they represent might in his lifetime have brought an action of tort for the personal injury resulting from the same act (b).

These propositions are subject to several special qualifications and exceptions. Most of the exceptions are of modern origin, and we shall see that since their establishment many attempts have been made to extend them. Such attempts have in some departments been successful, while in others exceptions which for some time were admitted have been more recently disallowed.

We shall now go through the rules thus stated in order, pointing out under each the limits within which exceptions are admitted in the present state of the law. The decisions which limit the exceptions are for the most part the chief authorities to show the existence of the rules, which are of so general a kind as to be rather assumed as the groundwork of decisions than expressly affirmed.

Part 2.—Contracts with uncertain persons.

Our first rule is that *the original parties to a contract must be persons ascertained at the time when the contract is made.* Rule 1. It No con-

(a) See *Sterens v. Benning*, 1 K. & J. 168, *Farrow v. Wilson*, L. R. 4 C. P. 744, 746; *Robinson v. Davison*, L. R. 6 Ex. 269; 2 Sm. L. C. 38. If in any of these cases the transaction is continued by mutual consent, it is a new contract: e.g. if a servant continues his service with a deceased master's family, or if a painter's executor, being also a

painter, were to complete an unfinished portrait on the original terms at the sitter's request.

(b) See 1 Wms. Exors. 752-3, 6th ed., 798, 7th ed. and *Bradshaw v. Lancashire & Yorkshire Ry. Co.*, L. R. 10 C. P. 189 (since questioned in *Leggott v. G. N. Ry. Co.*, 1 Q. B. D. 599).

tract with
uncertain
person.

may also be expressed shortly but less accurately thus: a contract cannot be made with an uncertain person. We need not stop to produce authorities for the general proposition, which will be sufficiently illustrated as we go on. Nor do we consider here the cases in which the parties to a contract are originally certain persons, but are liable to be changed on one or both sides in exceptional ways applicable to special kinds of contracts. These will be dealt with under a later head.

Statement
of ques-
tion. Cases
of apparent
exception.

It is obvious that there cannot be a contract without at least one ascertained party to make it in the first instance.

The question now before us is therefore reduced to this: In what cases, if any, can a contracting party bind himself by a floating obligation (as we may call it) to a person unascertained? The general rule is that "A party cannot have an agreement with the whole world; he must have some person with whom the contract is made" (a).

Yet such a floating obligation may be thought to exist in English law in the cases of promises or undertakings addressed to the public at large by advertisements or the like, and of sales by auction. The latter class of cases, so far as there is any ground for considering it to involve an exception from the ordinary law, is really a species of the former. Let us now see whether the exception is in any case more than apparent.

Advertise-
ments:
cases
where
principle
not in dis-
pute.

Nothing is more common than an advertisement offering a reward to whoever shall give certain information or find and restore certain lost property: and it probably never occurs to any one who is not a lawyer to suspect the difficulties—and those not of a merely technical kind—that arise from the consideration in a legal point of view of a matter apparently so simple. It was held a good while ago that when a reward was thus offered "there was a contract with any person who performed the condition mentioned in the advertisement" (b), and that such person

(a) *Squire v. Whitton*, 1 H. L. C. 333, 358.

(b) Per Parke, J. *Williams v. Carwardine*, 4 B. & Ad. 621. There is one older case *contra*, *Rolle Ab.* 1. 6, M. pl. 1, referred to in the reporter's note, 1 C. B. 440, and in

argument in *Denton v. G. N. R. Co.*, 5 E. & B. 864. But this cannot be now law. S. C. Noy 11, where the reason is given that "it was not averred nor declared to whom the promise was made."

could sue for the reward : and the general validity of such a contract has not been disputed in several modern cases of this sort which were argued and decided on other collateral grounds. It will be convenient to enumerate these cases before we enter on any discussion of the principle.

Williams v. Carwardine, 4 B. & Ad. 621. Reward offered by defendant for information which should lead to discovery of a murder. Information given by plaintiff, but not with a view to the reward. Held that the motive was immaterial, and plaintiff could recover.

Lancaster v. Walsh, 4 M. & W. 16 ; *Smith v. Moore*, 1 C. B. 438 ; *Thatcher v. England*, 3 C. B. 254, 15 L. J. C. P. 241 ; *Turner v. Walker*, L. R. 1 Q. B. 641, 2 Q. B. 301. All these were cases in which rewards were offered for information which should lead to the discovery of an offender, the restoration of property, or both : and the only question in each case was whether the party claiming the reward had really performed the condition proposed by the advertisement. So in *McKune v. Joynson*, 5 C. B. N. S. 218, 28 L. J. C. P. 133, the defendant, a master mariner, had signed a document called an advance note, offering "to pay to any person who shall advance 6*l.* to R. H. on this agreement the sum of 6*l.*" ten days after his ship sailed from Liverpool, provided R. H. should sail in it : and the only question was whether an advance partly in cash and partly in goods satisfied the condition.

England v. Davidson, 11 A. & E. 856 : reward offered for discovery of an offender, and claimed by a constable. It was objected that it was already the constable's duty to do his best to discover the offender, and that a promise to reward him for so doing was without consideration and against public policy ; but held that there might be services he was not bound to render, and a contract should not be deemed against the policy of the law without clear grounds.

No remark was made on the principle till an unsuccessful attempt at a new application of it was made in *Gerhard v. Bates* (a), where Lord Campbell said : "Those cases, though not now to be questioned, are somewhat anomalous." Attempts to extend the doctrine.

There the defendant was one of the promoters and a managing director of a mining company. The plaintiff sued him as on a guaranty of a minimum annual dividend of 33 per cent. to the bearers of a certain class of shares of which the plaintiff had bought a large number. This guaranty was contained in a prospectus issued by the directors. There was also a count in tort

(a) 2 E. & B. 476, 22 L. J. Q. B. 364.

in which the same statement was pleaded as a false and fraudulent representation. The Court held that the first count showed no contract between the plaintiff and the defendant. The promise was alleged to be to "the bearers of the said 12,000 shares," and it was further averred that the plaintiff confiding in that promise "became and was the purchaser and bearer of 2,500 of the said 12,000 shares." But it did not appear that the shares were transferable, or that there was any consideration for the alleged promise. The count in tort, however, was held good, the wrong being irrespective of contract, and a sufficient connexion being shown between the wrong and the plaintiff's loss.

Another unsuccessful experiment was made in *Spencer v. Harding (a)*. The defendant had issued a circular offering a stock of goods for sale by tender, but neither expressing nor disclaiming any undertaking to sell to the highest bidder: held that such an undertaking could not be implied. The question was as to the true meaning of the circular, and that was held to be not an offer, but a mere invitation of offers. It was admitted that an express undertaking would have been binding, and Willes, J. gave the explanation which will be immediately cited.

Two views:
1. Advertisement
a proposal
accepted
by performance.
Authorities.

There are two possible views of these general promises. One is that the advertisement or undertaking is a mere proposal; that the first person who performs the condition thereby accepts the proposal (*b*), and then, but not till then, there is a complete contract, which being made between ascertained parties is not really anomalous at all. This opinion is distinctly adopted by Mr. Leake in his work on Contracts (p. 13), and also in the following dictum of Willes, J. in *Spencer v. Harding (c)* :—

"In those cases [of rewards offered for the discovery of an offender] there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who *before the offer should be retracted* should happen to be the person to fulfill the contract of *which the advertisement was an offer or tender.*"

(a) L. R. 5 C. P. 561.

(b) The Indian Contract Act is silent as to this peculiar class of contracts, but says generally that

"Performance of the conditions of a proposal . . . is an acceptance of the proposal" (s. 8).

(c) L. R. 5 C. P. 561, 563.

The right of action is also maintained on precisely the same ground (and, one may presume, quite independently of English authorities) by Vangerow (a). The other view is that immediately on the publication of the advertisement there is an anomalous contract with the uncertain person who shall fulfil the condition. If this be correct the results would be of a surprising and not very reasonable kind; for a retractation, instead of being the revocation of a mere proposal, would be nothing else than an absolute refusal to perform an existing contract, and notice of the retractation to the person who performed the condition would be immaterial; nor would even the death of the promisor before the performance of the condition make any difference: unless indeed a second anomaly were introduced to correct the first. We are not aware that any English judge or writer has definitely proposed this view. However it is the only one that occurred to Savigny, who accordingly considered that on the general principles of the civil law there could be no right of action at all for a reward offered by public announcement (b). It is to a certain extent countenanced by the decision in *Williams v. Carwardine* (p. 175 *supra*) that it does not matter whether the person who performs the condition does it with a view to the reward or not, and by later cases in which the application of the doctrine has been somewhat extended. These cases must now be examined.

2. Advertisement a floating contract.

In *Denton v. G. N. Railway Co.* (c) it was held that the defendant company was liable as on a contract with the plaintiff that a train should run from Peterborough to Hull at or about 7.20 p.m. which was advertised in the company's current time-tables as so running. The facts were shortly these: The plaintiff had come from London to Peterborough, had done his business there, and wanted to go on to Hull the same night. He had made his arrangements on the faith of the time-tables, and presented himself in due time at the Peterborough station, applied for a ticket to Hull by the advertised train, and offered to pay the proper fare. The defendant company's clerk refused to issue

Examination of modern cases. *Denton v. G. N. R. Co.*

(a) Pand. § 603.

(b) Sav. Obl. 2. 90. As to practical results, he is content to observe that the reward will in most cases be paid anyhow, as being due in honour if not in law. It seems,

however, that he was alone in his opinion: Vangerow, Pand. § 603 (3. 255).

(c) 5 E. & B. 860, and better in 25 L. J. Q. B. 129, where the case stated is given at length.

such a ticket, for the reason that the 7.20 train no longer went to Hull. The fact was that beyond Milford Junction the line to Hull belonged to the North Eastern Ry. Co., who formerly ran a train corresponding with the G. N. R. Co.'s train, and for which the G. N. R. Co. issued through tickets by arrangement between the two companies. This corresponding train had now been taken off by the N. E. R. Co., but the G. N. R. time-table had not been altered. The plaintiff was unable to go further than Milford Junction that night, and so missed an appointment at Hull and sustained damage. The cause was removed from a County Court into the Queen's Bench and the question was whether on the facts as stated in a case for the opinion of the Court the plaintiff could recover (*a*).

It was held by the Court unanimously that the case showed a good cause of action in tort for the false representation contained in the time-tables : and by Lord Campbell, C. J. and Wightman J. that when any one offered to take a ticket to any of the places to which the train was advertised to carry passengers the company contracted with him to receive him as a passenger to that place according to the advertisement. Lord Campbell treated the statement in the time-table as a conditional promise which on the condition being performed became absolute. Crompton J. (*b*) though not dissenting found certain difficulties in this and preferred to rest his judgment on a breach of the defendants' duty as common carriers. The opinion of the majority on this point was not necessary to the decision, as the Court held unanimously that the plaintiff could recover in tort, and they only had to find whether on the facts stated he could succeed in any form of action. There can be no doubt however that if the action had been brought in the superior court in the first instance, and there had been before the court on demurrer an aptly framed declaration on the facts stated in the case, with counts in contract and in tort, the plaintiff would have had judgment on both. Still, treating the matter as if it had actually been so, this judgment is not easy to reconcile with the then recent decision of the same Court that the count in contract in *Gerhard v. Bates* (*c*) was bad.

(*a*) As to the measure of damages, which here was not in dispute, see *Hamlin v. G. N. R. Co.* 1 H. & N. 408, 26 L. J. Ex. 20 (where a ticket having been taken there was

an unquestionable contract).

(*b*) The fuller report of his judgment is that in 5 E. & B.

(*c*) 2 E. & B. 476, 22 L. J. Q. B. 364 ; *supra*, p. 175.

Reserving further observations, we proceed to the next case in which an extension was suggested. There is this preliminary observation to be made, that the contract of sale in an ordinary sale by auction is in no way anomalous, for each bidding is only a proposal, and there is no contract until some bid is accepted by the fall of the hammer, when there is a contract with an ascertained person, namely the bidder to whom the lot is knocked down (a).

Warlow v.
Harrison.

In *Warlow v. Harrison* a sale by auction was announced as without reserve, the name of the owner not being disclosed. The lot was put up, but in fact bought in by the owner. The plaintiff, who was the highest real bidder, sued the auctioneer as on a contract to complete the sale as the owner's agent. The court of Queen's Bench (b) held that this was wrong; the Court of Exchequer Chamber (c) affirmed the judgment on the pleadings as they stood, but thought the facts did show another cause of action. Watson and Martin, BB. and Byles, J. considered that the auctioneer contracted with the highest *bona fide* bidder that the sale should be without reserve. They said they could not distinguish the case from that of a reward offered by advertisement, or of a statement in a time-table. Willes, J. and Bramwell, B. preferred to say that the auctioneer by his announcement warranted that he had authority to sell without reserve, and might be sued for a breach of such warranty. The result was that leave was given to the plaintiff to amend and proceed to a new trial, which however was not done (d). The opinions expressed by the judges, therefore, are not equivalent to the actual judgment of a Court of Error, and have been in fact regarded with some doubt in a later case where the Court of Queen's Bench decided that at all events an auctioneer whose principal is disclosed by the conditions of sale does not contract personally that the sale shall be without reserve (e). Still more recently the same Court has held that when an auctioneer in good faith advertises a sale of certain goods, he does not by that advertisement alone enter into any contract or warranty with those who attend the sale that the

Doctrine
subse-
quently
doubted
and not
extended.

(a) *Payne v. Cave*, 3 T. R. 148.
Cp. Savigny, Obl. 2. 92.

(b) 1 E. & E. 295, 28 L. J. Q. B. 18.

(c) 1 E. & E. 309, 29 L. J. Q. B. 14.

(d) The parties agreed to a *stet*

processus; see note in the L. J. report.

(e) *Mainprice v. Westley*, 6 B. & S. 420, 34 L. J. Q. B. 229.

goods shall be actually sold (a). This case is analogous to *Spencer v. Harding* (b).

Analysis
of the ge-
neral view
expressed
in these
authori-
ties,

We can now resume the consideration of the principles which govern or should govern the subject. The general view embodied in the opinions of the majority of the judges in *Denton v. G. N. R. Co.* and *Warlow v. Harrison* may be expressed in terms of the regular elements of contract as follows : One who proposes a contract may make an identical proposal to several persons, so that there shall be a contract, according to the nature of the case, either with that person only who first accepts, or with everyone separately who accepts the proposal. Such proposal need not be addressed to any definite number of persons, nor communicated immediately by the proposer himself, but may be made by a public announcement addressed to all persons to whose knowledge it shall come. [Where a proposal is made by such announcement, a revocation of it by an equally public announcement is effectual even as against a person who afterwards acts on the original proposal without knowledge of the revocation ; for " he should have known that it could be revoked in the manner in which it was made."] (c).

Performance of the conditions of the proposal is a sufficient acceptance and is also a sufficient consideration for the promise. Knowledge of the proposal and an intention to accept it may be presumed from the fact of performance (d).

which
however
does not
explain the
result in
the parti-
cular cases.

This affords a satisfactory explanation in the ordinary case of a reward or reimbursement offered by advertisement. The effect is the same as if the promisor had hired the acceptor in person to do the service for which the reward is offered. It has been in fact suggested from the bench that an action for work and labour might have been allowed in these cases, and the advertisement treated as evidence of the value of the work done (e).

(a) *Harris v. Nickerson*, L. R. 8 Q. B. 286.

(b) L. R. 5 C. P. 561, *supra*, p. 176.

(c) So held by the Supreme Court of the United States in *Shuey v. U. S.*, 2 Otto (92 U. S.) 73. It would be more exact to say that in such a case the proposal itself is subject to an implied condition to this

effect. *Sed qu.*

(d) This (if not more) seems to be involved in the decision in *Williams v. Carwardine*, *supra*, p. 175.

(e) Per Lord Campbell, C. J. in *Gerhard v. Bates*, 2 E. & B. 476, 22 L. J. C. P. 364, 369 ; per Crompton, J. in *Denton v. G. N. R. Co.* *supra*.

The case of the intending passenger who relies on the time-table is not so plain. There we must consider the demand of a ticket for the proposed journey, accompanied with an offer to pay the proper fare, as the act of acceptance which completes the contract. But this demand is itself the proposal of another and distinct contract, namely to carry the passenger on that particular journey in consideration of actual payment of the fare. It seems a little odd to hold that the proposal of one contract operates as the conclusion of another preliminary and auxiliary contract—namely that the person to whom the proposal is made shall be capable of carrying out the principal contract—and that a refusal to enter into the principal contract constitutes a breach of this auxiliary one. Moreover the consideration for the auxiliary contract consists in the preparations made by the party for entering into the principal one. The same remarks apply (*mutatis mutandis*) to the case of the auctioneer's undertaking to sell without reserve. We have to suppose a contract concluded not by the acceptance of a bidding but by the bid itself. A greater difficulty lies in the problem of settling the extent of the doctrine. If a man advertises that he has goods to sell at a certain price, does he contract with any one who comes and offers to buy those goods that until further notice communicated to the intending buyer he will sell them at the advertised price? (a). Again, does the manager of a theatre contract with every one who comes to the theatre and is ready to pay for a place that the piece announced shall be performed? or do directors or committeemen who summon a meeting contract with all who come that the meeting shall be held? Again, on this theory a common carrier would be liable in contract as well as in tort for refusing to carry goods—indeed the case seems not distinguishable from that of the time-table. In short, we might thus arrive at an extended notion of contract which would cover all the cases in which courts of equity have interfered, on grounds independent of contract, as was supposed, to compel persons to make good their representations (b), and would indeed go beyond them: for a representation not only of fact, but of mere intention, might be treated as a proposal, and as soon as anything was done on

Difficulties
of *Denton*
v. *G. N. R.*
Co. and
Warlow v.
Harrison
on theory
of proposal
and ac-
ceptance.

(a) See per Crompton, J. in *Denton v. G. N. R. Co. supra.*

(b) See *Dav. Conv.* 3, pt. 1. 646;

per Lord Selborne, L. R. 6 H. L. at p. 360.

the faith of it there would be an acceptance and a complete contract. On some such principle it has been attempted in America to enforce the payment of voluntary subscriptions for charitable or public objects ; but its fallacy has been exposed by a late decision of the Supreme Court of Massachusetts (*a*).

Another matter for remark is the effect of notice of revocation. Suppose the traveller had seen and read a new and correct edition of the time-table in the booking office immediately before he offered to take his ticket. This would clearly have been a revocation of the proposal of the company held out in the incorrect time-table, and on the present hypothesis no contract could arise. Similarly if on putting up a particular lot the auctioneer expressly retracted as to that lot the statement of the sale being without reserve, there could be no such contract with the highest *bona fide* bidder as supposed in *Warlow v. Harrison*. But this, it may be answered, matters little, for if there is any real grievance the party aggrieved may still have his remedy by suing in tort. He may so ; and he would equally have it if the notion of contract had never been introduced into these cases. Or are we to say that a reasonable notice of revocation must be given ? This would be to say that the proposal of a contract gives the person to whom the proposal is made a sort of inchoate right which may be violated by an unreasonable revocation : a doctrine which in English law is absolutely unheard of (*b*). Then there is also the difficulty of determining what acts constitute the acceptance, and at what point of time the acceptance is complete ; which, when the nature of the case did not provide for a formal act such as making a bid or demanding a ticket, might be exceedingly serious.

Difficulties
on theory
of floating
contract.

Let us now turn to the other view, and see whether the doctrine of *Denton v. G. N. R. Co.* and *Warlow v. Harrison* can be better supported on the theory of a floating obligation. On that theory there would be not a proposal, but a conditional obligation arising at once from the announcement made by the promisor : it would at any rate be necessary to find in that announcement some decided intention of contracting, and

(*a*) *Cottage Street Church v. Kendall*, 121 Mass. 528.

(*b*) Such a doctrine is not unknown on the Continent : see note to *Frost v. Knight*, L. R. 5 Ex. at

p. 337, and p. 9, *supra*. As to the somewhat analogous suggestion made in that case, see s. c. in Ex. Ch. L. R. 7 Ex. at p. 117.

this might furnish a satisfactory limit to the class of cases in which an obligation could be held to exist. But then where would be the consideration? And even putting that objection out of sight, there remains the absurd consequence already pointed out, that the offer could not be revoked. To put an extreme case: suppose a man bound himself by a voluntary deed to give a sum of money to whoever should first come to his funeral, or to the person who should be the next Lord Mayor after his death (*a*), could his executors be sued upon it? In short, such a doctrine is impracticable.

There seem therefore to be grave difficulties either way: and when we bear in mind that the judgments which suggest them are not really decisive, it may perhaps be thought that the whole matter is open to reconsideration. It is submitted that the contracts of the railway company and the auctioneer, if such contracts there be, are express and actual, not implied in law; that in all cases of actual contract the first thing is to ascertain the real intention of the parties not less as to the making of any contract at all than as to the construction of a contract if made; and that the judgments in question may fairly be said to overstep this rule. The proposal of a definite service to be done for reward, which is in fact a request (in the sense of the ordinary English law of contract) for that particular service, though not addressed to any one individually, is quite different in its nature from a declaration to all whom it may concern that one is willing to do business with them in a particular manner. Of course the person who publishes such an invitation does contemplate that people who choose to act on it will do whatever is necessary to put themselves in a position to avail themselves of it, such as sending in tenders by letter, coming to a shop or a railway station, and the like. So far as all these things are necessary to bring customers, he desires them to be done; but they are merely incidental to the real object; they are not elements of a contract but preliminaries. It does not seem consonant either with legal or with natural reason to construe such preliminaries into the consideration for a contract which the parties had no inten-

Qu. do not these cases overlook the necessity of showing animus contrahendi?

(*a*) See the dispositions (by legacy) to uncertain persons suggested in *Gai. 2. 238*; cp. remark of Lord Campbell, *C. J. 3 E. & B. 837*.

tion of making (a). A comparison of the view here proposed with the recent cases of *Spencer v. Harding* (b) and *Harris v. Nickerson* (c) will show that it has been substantially acted upon, though somewhat differently expressed. The Courts appear in those cases, if we may venture to say so, to have returned to a sounder observance of the general principles of contract.

It may perhaps be safely inferred that the doctrines of *Denton v. G. N. R. Co.* (d) and *Warlow v. Harrison* (e), if not directly disapproved, will at least not be extended beyond their application to precisely similar circumstances.

A discussion of the remedy by action in tort for false representation in cases of this class is not within the province of this work. If that remedy were made co-extensive with the real or supposed concurrent remedy in contract so far as concerns the rights and liabilities of deceased persons' estates, the attainment of substantial justice might be promoted, and all inducement to artificial extensions of the law of contract removed.

Same principle applied in equity:
Ex parte Asiatic Banking Corporation.

We have postponed to the end of this discussion the mention of a recent case in equity decided partly on a ground which brings it into this class, though it is chiefly important as the first of a series establishing another proposition which will find its place farther on (f).

The question was as to the effect of the following letter of credit given by Agra and Masterman's Bank to Dickson, Tatham and Co.

"No. 394. You are hereby authorized to draw upon this bank at six months sight, to the extent of £15,000 sterling, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to indorse particulars on the back hereof. The bills must specify that they are drawn under credit No. 394, of the 31st of October, 1865."

The Asiatic Banking Corporation held for value bills drawn on the Agra and Masterman's Bank under this letter; the Bank

(a) To the like effect *Vangerow*, Pand. § 603 (3. 258) distinguishing an actual proposal (Antrag) from mere invitation of proposals (Auforderungen zu Anträgen).

(b) L. R. 5 C. P. 561; *supra*, p. 176.

(c) L. R. 8 Q. B. 286; *supra*,

p. 180.

(d) 5 E. & B. 860, 25 L. J. Q. B. 129.

(e) 1 E. & E. 309, 29 L. J. Q. B. 14.

(f) *Ex parte Asiatic Banking Corporation*, 2 Ch. 391.

stopped payment before the bills were presented for acceptance, and Dickson, Tatham, and Co. were indebted to the Bank in an amount exceeding what was due on the bills: but the Corporation claimed nevertheless to prove in the winding-up for the amount, one of the grounds being "that the letter shown to the person advancing money constituted, when money was advanced on the faith of it, a contract by the Bank to accept the bills." Cairns, L. J., adopted this view, holding that the letter did amount to "a general invitation" to take bills drawn by Dickson, Tatham, and Co. on the Agra and Masterman's Bank, on the assurance that the Agra and Masterman's Bank would accept such bills on presentation; and that the acceptance of the offer in this letter by the Asiatic Banking Corporation constituted a binding legal contract against the Agra and Masterman's Bank. He then went on to the other ground of decision, of which more afterwards. *Scott v. Pilkington* (a) is to some extent adverse to this view. There the action was brought on a judgment of the Supreme Court of New York, on a very similar state of facts. The decision was that the law applicable to the case was the law of New York, and that the judgment having been given by a court of competent jurisdiction in a case to which the local law was properly applicable, there was no room to question its correctness in an English court. So far as any opinion was expressed by the Court as to what should have been the decision on the same facts in a case governed by the law of England, it was against any right of action at law being acquired by the billholders. This however was by the way, and as a concession to the defendants, and is therefore no positive authority. Anyhow the difficulties we have suggested above do not seem to exist in this case. From an open letter of credit (containing too in this instance an express request to persons negotiating bills under it to indorse particulars) there may be inferred without any violence either to law or to common reason a proposal or request by the author of the letter to the mercantile public to advance money on the faith of the undertaking expressed in the letter. This undertaking must then be treated as addressed to any one who shall so advance money: the thing to be performed by way of consideration for the undertaking is definite and substantial, and

This case free from the difficulty in *Denton v. G. N. R. Co.*

(a) 2 B. & S. 11, 31 L. J. Q. B. 81.

is in fact the main object of the transaction. If any question arose as to a revocation of the proposal, it would be decided by the rules which apply to the revocation of proposals made by letter in general (*a*). There is no fiction or anomaly in the matter.

Statute of
Frauds
and con-
tracts by
advertis-
ment:
dicta in
Williams
v. Byrnes.

The bearing of the Statute of Frauds on these contracts made by advertisements or general offers has been discussed incidentally in a case brought before the Judicial Committee of the Privy Council on appeal from the Supreme Court of New South Wales (*b*). It is settled that the requirements of the statute in the cases where it applies are generally not satisfied unless the written evidence of the contract shows who both the contracting parties are. But it was suggested in the Colonial Court that in the case of a proposal made by advertisement, where the nature of the contract (*e.g.* a guaranty) was such as to bring it within the statute, the advertisement itself might be a sufficient memorandum, the other party being indicated as far as the nature of the transaction would admit (*c*). The Judicial Committee, however, showed a strong inclination to think that this view is not tenable, and that in such a case the evidence required by the statute would not be complete without some further writing to show who in particular had accepted the proposal. It was observed that as a matter of fact the cases on advertisements had been of such a kind that the statute did not apply to them, and it was a mere circumstance that the advertisement was in writing (*d*). We are not aware of the point having arisen in any later case. The opinion here expressed by the Court is worth noticing for another reason. It is an authority in favour of the view which we have adopted as the sounder one, namely that there is no anomalous contract, but a contract between ascertained persons which is constituted by the acceptance of the proposal.

Part 3. Effects of Contract as to Third Persons.

The affirmative part of our second rule, namely: *The creditor can demand performance from the debtor or his representatives,*

(*a*) See however *Shuey v. United States*, note *c*, p. 180 above.

(*b*) *Williams v. Byrnes*, 1 Moo. P. C. C. N. S. 154.

(*c*) Per Stephen, C. J. at pp. 167, 184.

(*d*) See at p. 198. The language

of the head-note is misleading; there is no suggestion in the judgment of any such proposition of law as that the Statute of Frauds is not applicable to contracts made in this manner.

is now and long has been, though it was not always, elementary (a).

The negative part of it states that *the creditor cannot demand, nor can the debtor require him to accept, performance from any third person.* This is subject to the explanation that the debtor or his representatives may perform the duty by an agent, which again is modified by the exception of strictly personal contracts as mentioned at the end of the rules. On this we need not dwell at present.

Rule 2.
No liability imposed on third persons.

It is obvious on principle that it is not competent to contracting parties to impose liabilities on other persons without their consent.

Its foundation in principle.

Every person not subject to any legal incapacity may dispose freely of his actions and property within the limits allowed by the general law. Liability on a contract consists in a further limitation of this disposing power by a voluntary act of the party which places some definite portion of that power at the command of the other party to the contract. So much of the debtor's individual freedom is taken from him and made over to the creditor (b). When there is an obligation independent of contract, a similar result is produced without regard to the will of the party: the liability is annexed by law to the party's own wrongful act in the case of tort, and in the case of quasi-contracts to another class of events which may be roughly described as involving the accession of benefit through the involuntary loss

(a) As to the liability of personal representatives on the contracts of the testator or intestate see 1 Wms. Saund. 241-2. The old rule that an action of *debt* on simple contract would not lie against executors where the testator could have waged his law (though it is said the objection could be taken only by demurrer) seems to have been in truth an innovation. See the form of writ for or against executors, Fleta l. 2, c. 62, § 9, and cp. F. N. B. 119 M, 121 O (the latter passage is curious: if a man has entered into religion his executors shall be sued for his debt, not the abbot who accepted him into religion: see p. 61, n. (a), *supra*), and Y. B. 30 Ed. 1 (Rolls ed.) p. 238. It is said

however that "Quia executores non possunt facere legem pro defuncto, petens probabit talliam suam, vel si habeat sectam secta debet examinari:" Y. B. 20 & 21 Ed. 1, p. 456. For the conflict of opinion as to the remedy by *assumpsit*, see Reeves 3. 403, Y. B. Mich. 2. H. 8. 11, pl. 3, the strange dictum *contra* of Fitzherbert, Trin. 27 H. 8. 23, pl. 21, who said there was no remedy at all, and *Norwood v. Read*, in B. R., Plow. 180, followed by *Pinchon's* ca. in Ex. Ch. 9 Co. Rep. 86 b, where this dictum was overruled, authorities reviewed and explained, and the common law settled in substance as it now is.

(b) Cp. Savigny Obl. § 2.

of another person : but when an obligation is founded upon a true contract, the assent of the person to be bound is at the root of the matter and is indispensable (a).

Agency :
the excep-
tion only
apparent.

The ordinary doctrines of agency form no real exception to this. For a contract made by an agent can bind the principal only by force of a previous authority or subsequent ratification ; and that authority or ratification is nothing else than the assent of the principal to be bound, and the contract which binds him is his own contract. Under certain conditions there may be a contract binding on the agent also, but with that we are not here concerned. We shall return to the subject of agency under Rule 3, and the rights and liabilities of principals and agents respectively on contracts made by agents will then be more fully considered.

When
companies
held in
equity to
promoters'
agree-
ments ; not
*ex con-
tractu*.

Another less simple apparent exception occurs in the cases in which companies have been held liable to fulfil the agreements made by their promoters before the companies had any legal existence. These cases however proceed partly on the ground of a distinct obligation having either been imposed on the company in its original constitution, or assumed by it after its formation (b), partly on a ground independent of contract and analogous to estoppel, namely that when any person has on certain terms assisted or abstained from hindering the promoters of a company in obtaining the constitution and the powers sought by them, the company when constituted must not exercise its powers to the prejudice of that person and in violation of those terms. The doctrine as now established probably goes as far as this, but certainly no farther (c).

Stranger
held bound
by award
in equity :
sed qu.

In one case of a suit in equity for specific performance of an award a third person interested in the subject-matter was made a party : and Sir L. Shadwell held that he was bound by the award, though he had not been a party to the reference and had

(a) *Lumley v. Gye*, 2 E. & B. 216, 22 L. J. Q. B. 463, shows that a stranger may be liable in tort for maliciously procuring the breach of a contract. But this is not an obligation under the contract, any more than when A. sells his land to B. the

duty of all men to respect the rights of B. instead of A., as owner of that land, is a duty under the contract of sale or the conveyance.

(b) *Lindley* 1. 409, 411.

(c) *Lindley* 1. 412-417.

in no way assented to it, but simply knew of it and remained passive (a). This decision does not appear to have been much considered, and does appear quite contrary to principle. Moreover it cannot stand with Lord Cottenham's decision in *Tusker v. Small* (b) that in a suit for the specific performance of a contract third persons claiming an interest in the subject-matter are not even proper parties: and even without this it is surely obvious (unless and until a court of final appeal shall think otherwise) that A. and B. have no business to submit C.'s rights to the arbitration of D. It is apprehended accordingly that this exception may be treated as non-existent.

Another branch of the same general doctrine, which on principle is scarcely less obvious, is that the debtor cannot be allowed to substitute another person's liability for his own without the creditor's assent. Some authorities which illustrate this are referred to in a subsequent chapter where we consider from another point of view the rule that a contract cannot be made except with the person with whom one intends to contract (c). When a creditor assents at the debtor's request to accept another person as his debtor in the place of the first, this is called a novation. Whether there has been a novation in any particular case is a question of fact, but assent to a novation is not to be inferred from conduct unless there has been a distinct and unambiguous request (d). Such questions are especially important in ascertaining who is liable for the partnership debts of a firm when there has been a change in the members of the firm, or on contracts made in a business which has been handed over by one firm (whether carried on by a single person, a partnership, or a company) to another. A series of cases which were, or were supposed to be, of this kind has arisen in late years out of successive amalgamations of life insurance companies (e).

The question may be resolved into two parts: Did the new

(a) *Govett v. Richmond*, 7 Sim. 1. The case of *Taylor v. Parry*, 1 Man. & Gr. 604, seems at first sight to make the same way; but there the Court relied on positive acts of the parties as showing that they adopted the reference and were substantially parties to it.

(b) 3 My. & Cr. 63, followed in

De Hoghton v. Money, 2 Ch. 164.

(c) *Robson v. Drummond*, 2 B. & Ad. 303; *infra*, Ch. VIII.

(d) *Conquest's ca.* 1 Ch. D. 334, 341.

(e) It is doubtful whether some of these were really cases of novation: see *Hort's ca.* & *Grain's ca.* 1 Ch. D. 307, 322.

firm assume the debts and liabilities of the old? and did the creditor, knowing this, consent to accept the liability of the new firm and discharge the original debtor (a)? It would be beyond our scope to enter at large on this subject, for an exposition of which the reader is referred to Mr. Justice Lindley's work on Partnership (b).

Real ex-
ceptions to
come
under
Rule 4.

There exist however exceptions to the general rule. In certain cases a new liability may without novation be created in substitution for or in addition to an existing liability, but where the possibility exists of such an exceptional transfer of liabilities it is bound up with the correlated possibility of an exceptional transfer of rights, and cannot be considered alone. For this reason the exceptions in question will come naturally to our notice under Rule 4, when we deal with the peculiar modes in which rights arising out of certain classes of contracts are transferred.

Apart from novation in the proper sense, the creditor may bind himself once for all by the original contract to accept a substituted liability at the debtor's option. Such an arrangement is in the nature of things unlikely to occur in the ordinary dealings of private persons among themselves. But it has been decided in the winding-up of the European Assurance Society that where the deed of settlement of an insurance company contains a power to transfer the business and liabilities to another company, a transfer made under this power is binding on the policy-holders and they have no claim against the original company (c). In the case of a policy-holder there is indeed no subsisting debt (c), but he is a creditor in the wider sense above defined (p. 171).

Rule 3. No third person can become entitled by the contract itself to demand the performance of any duty under the contract.

Rule 3.
No rights
conferred

Before we consider the possibility of creating arbitrary exceptions to this rule in any particular cases, there are some extensive

(a) See *Rolfe v. Flower*, L. R. 1 P. C. 27, 44.

(b) 1. 450-465, 479-481 : and as to the general principle of novation see *Wilson v. Lloyd*, 16 Eq. 60, 74 ;

for a later instance of true novation, *Miller's ca.* 3 Ch. 391.

(c) *Hort's ca.* and *Grain's ca.* 1 Ch. D. 307 ; *Harman's ca.* *ib.* 326 ; *Cocker's ca.* 3 Ch. D. 1.

classes of contracts and transactions analogous to contract which call for attention as offering real or apparent anomalies. on third persons.

A. Contracts made by agents. Here the exception is only apparent. The principal acquires rights under a contract which he did not make in person. But the agent is only his instrument to make the contract within the limits of the authority given to him, however extensive that authority may be : and from the beginning to the end of the transaction the real contracting party is the principal. Exceptions.
Agency: apparent only.

Consider the following series of steps from mere service to full discretionary powers : Degrees of agency.

1. A messenger is charged to convey a proposal, or the acceptance or refusal of one, to a specified person.

2. He is authorized to vary the terms of the proposal, or to endeavour to obtain a variation of the other party's proposal (*i.e.* to make the best bargain he can with the particular person), within certain limits.

3. He is not confined to one person, but is authorized to conclude the contract with any one of several specified persons, or generally with any one from whom he can get the best terms.

4. He is not confined to one particular contract, but is authorized generally to make such contracts in a specified line of business or for specified purposes as he may judge best for the principal's interest (*a*).

The fact that in many cases an agent contracts for himself as well as for his principal, and the modifications which are introduced into the relations between the principal and the other party according as the agent is or is not known to be an agent at the time when the contract is made, do not prevent the acts of the agent within his authority from being for the purposes of the contract the acts of the principal, or the principal from being the real contracting party. Again, when the agent is also a contracting party there are two alternative contracts with the agent and with the principal respectively. Agent contracting personally.

As for the subsequent ratification of unauthorized acts, there is no difference for our present purpose between a contract made Ratification.

(*a*) Cp. Savigny Obl. 2. 57-60.

with authority and one made without authority and subsequently ratified. The consent of the principal is referred back to the date of the original act by a beneficent and necessary fiction.

Here would be the proper place to consider who can sue and be sued on contracts made by agents: but as this discussion would take up such an amount of space as to interfere with the proportion and connexion of the different parts of the subject, it is reserved for an appendix which will be found at the end of this chapter.

Other relations: principal and surety; terms annexed by law to original contract.

B. There are certain relations created by contract, of which that of creditor, principal debtor, and surety may be taken as the type, in which the rights or duties of one party may be varied by a new contract between others. But when a surety is discharged by dealings between the creditor and the principal debtor, this is the result of a condition annexed by law to the surety's original contract. There is accordingly no real anomaly, though there is an apparent exception to the vague maxim that the legal effects of a contract are confined to the contracting parties: and there is not even any verbal inconsistency with any of the more definite rules we have stated. However it seems proper not to omit the mention of such cases, inasmuch as they have been considered as real exceptions by writers of recognized authority (a).

Anomalous effects of bankruptcy and insolvency.

Insolvency and bankruptcy, again, have various consequences which affect the rights of parties to contracts, but which the general principles of contract are inadequate to explain. We allude to them in this place only to observe that it is best to regard them not as derived from or incidental to contract, but as results of an overriding necessity and beyond the region of contract altogether (b). Even those transactions in bankruptcy and insolvency which have some resemblance to contracts, such as compositions with creditors, are really of a judicial or quasi-judicial character. It is obvious that if these transactions were merely contracts no dissenting creditor could be bound.

(a) See Pothier Obl. § 89.

(b) A striking instance is furnished by the rule in *Waring's case*.

19 Ves. 345: see per Lord Cairns, *Banner v. Johnston*, L. R. 5 H. L. at p. 174.

C. The case of trusts presents a real and important exception, if a trust is regarded as in its origin a contract between the author of the trust and the trustee. It is quite possible, and may for some purposes be useful so to regard it. The Scottish institutional writers (who follow the Roman arrangement in the learning of Obligations as elsewhere) consider trust as a species of real contract coming under the head of deposition (a). Conversely deposits, bailments, and the contract implied by law which is the foundation of the action for money received, are spoken of in English books as analogous to trusts (b). A chapter on the duties of trustees forms part of the best known American text-books on contracts, though no attempt is made, so far as we have ascertained, to explain the logical connexion of this with the rest of the subject.

Trusts: a real exception, if trust a contract between author of trust and trustee. So treated by Scottish and American writers: analogy suggested in English books.

It is more important to observe that Lord Selborne in a recent case, where the question was of mortgagee's costs, made the following observations:—

Authority of Lord Selborne for so regarding it.

"The contract between mortgagor and mortgagee, as it is understood in this Court, makes the mortgage a security . . . for the costs properly incident to a suit for foreclosure or redemption. In like manner the contract between the author of a trust and his trustees entitles the trustees, as between themselves and their *cestui que trust*, to receive out of the trust estate all their proper costs incident to the execution of the trust. These rights, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty *under the contract*."

This involves the statements—

1. That a trust is in its inception a contract.
2. And a contract such that third persons, namely the *cestui que trust*, acquire independent rights under it: which gives to the transaction that exceptional character with which we are now concerned.

And in fact the relation of a trustee to his *cestui que trust* is closely analogous to that of a debtor to his creditor, in so far as it has the nature of a personal obligation and is governed by the general rules derived from the personal character of obligations.

General analogy to contract.

(a) *Sic*, though no such abstract term is known in Roman law. See

Erskine, Inst. Bk. 3, Tit. 1. s. 32.
(b) Blackstone, Comm. 3. 432.

Thus the transfer of equitable rights of any kind is subject, as regards the perfection of the transferee's title, to precisely the same conditions as the transfer of rights under a contract. And the true way to understand the nature and incidents of equitable ownership is to start with the notion not of a real ownership which is protected only in a court of equity, but of a contract with the legal owner which (in the case of trusts properly so called) cannot be enforced at all, or (in the case of constructive trusts, such as that which arises on a contract for the sale of land) cannot be enforced completely, except in a court of equity (*a*).

However although every trust may be said to include a contract, it includes so much more, and the purposes for which the machinery of trusts is employed are of so different a kind, that trusts are distinct in a marked way not merely from every other species of contract, but from all other contracts as a genus. The complex relations involved in a trust cannot be conveniently reduced to the ordinary elements of contract, and there seems to be sufficient justification (independently of the historical reason supplied by the exclusive jurisdiction of Equity) for the course hitherto adopted by all English writers in dealing with trusts as a separate branch of law.

Exception
of certain
provisions
for child-
ren.

D. Closely connected with the cases covered by the doctrine of trusts, but extending beyond them, we have the rules of equity by which special favour is extended to provisions made by parents for their children. This exception has already been noted in stating the general rule (p. 172 above). In the ordinary case of a marriage settlement the children of the contemplated marriage itself are said to be "within the consideration of marriage" and may enforce any covenant for their benefit contained in the settlement. Where a settlement made on the marriage of a widow provides for her children by a former marriage, such children, though in the technical language of equity *volunteers*, or persons having no part in the consideration, are likewise entitled to enforce the provisions for their benefit :

(*a*) See per Lord Westbury, *Knox v. Gye*, L. R. 5 H. L. at p. 675 ; *Shaw v. Foster*, *ib.* at p. 338 (Lord Cairns), and at p. 356 (Lord Hatherley).

but it is doubtful whether this extends to the case of a husband making a provision for his children by a former wife (*a*).

The question how far limitations in a marriage settlement to persons other than children can be supported by the consideration of marriage, so as not to be defeasible under 27 Eliz. c. 4 against subsequent purchasers, is a distinct and wider one, not falling within the scope of the present work (*b*).

E. There is also a considerable class of statutory exceptions in cases where companies and public bodies, though not incorporated, are empowered to sue and be sued by their public officers or trustees. The enactments of this kind relating to companies are collected and commented on by Mr. Justice Lindley (*c*). Statutory exceptions: powers to sue by public officers, &c.

The trustees of Friendly Societies and Trade Unions are likewise empowered to sue, and may be sued, in their own names, in cases concerning the property of the society or union (*d*). In a recent case in the Queen's Bench an enactment that a local authority might recover certain expenses, such authority not being incorporated and no special remedy provided, was held to make the local authority a quasi corporation for the purpose of suing (*e*). This however was not on a contract, but on a purely statutory cause of action.

By the 8 & 9 Vict. c. 106, s. 5 a person who is not a party to an indenture may nevertheless take the benefit of a covenant in it relating to real property. This enactment has not, so far as we know, been the subject of any reported decision (*f*). Covenants relating to real property.

Having disposed of these special exceptions, we may now proceed to examine the rule in its ordinary application, which General application of rule.

(*a*) *Gale v. Gale*, 6 Ch. D. 144, 152.

(*b*) The references in *Gale v. Gale* (last note) will guide the reader, if desired, to the authorities, including the full discussion in Mr. May's book on Voluntary and Fraudulent Conveyances.

(*c*) Lindley, Ptnp. 1. 509 sqq. See also Leake on Contracts, 225.

(*d*) Friendly Societies Act, 1875, 38 & 39 Vict. c. 60, s. 21; Trade Union Act 1871, 34 & 35 Vict. c. 31, s. 9. It is the same with building societies formed before the Act

of 1874 and not incorporated under it.

(*e*) *Mills v. Scott*, L. R. 8 Q. B. 496.

(*f*) For an example of the inconvenience provided against by it see *Lord Southampton v. Brown*, 6 B. & C. 718, where the person who was really interested in the payment of rent on a demise made by trustees, and with whom jointly with the trustees the covenant for payment of rent was expressed to be made, was held incapable of joining in an action on the covenant.

may be expressed thus:—The agreement of contracting parties cannot confer on a third person any right to enforce the contract.

There are two different classes of cases in which it may seem desirable, and in which accordingly it has been attempted, to effect this: (1) where the object of the contract is the benefit of a third person: (2) where the parties are numerous and the persons really interested are liable to be changed from time to time.

Contract
for benefit
of third
person.

Third per-
son cannot
sue at law.

It was for a long time not fully settled whether a contract between A. and B. that one of them should do something for the benefit of C. did or did not give C. a right of action on the contract (*a*). And there was positive authority that at all events a contract made for the benefit of a person nearly related to one or both of the contracting parties might be enforced by that person (*b*). However the rule is now distinctly established, so far as any common-law right of action is concerned, that a third person cannot sue on a contract made by others for his benefit even if the contracting parties have agreed that he may, and that near relationship makes no difference. This was decided by the Court of Queen's Bench in *Tweddle v. Atkinson* (*c*). The following written agreement had been entered into:

“Memorandum of an agreement made this day between William Guy,” &c., “of the one part, and John Tweddle of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of £200 to William Tweddle his son-in-law, railway inspector, residing in Thornton, in the county of Fife in Scotland, and the said John Tweddle father to the aforesaid William Tweddle shall and will pay the sum of £100 to the said William Tweddle each and severally the said sums on or before the 21st day of August 1855; and it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified.”

(*a*) See *Viner Abr. Assumpsit*, Z. (l. 333-7); per *Eyre, C. J. Co. of Feltmakers v. Davis*, 1 Bos. & P. 98; note to *Pigott v. Thompson*, 3 Bos. & P. 149.

(*b*) *Dutton v. Poole* (Ex. Ch.), 2 Lev. 210, Vent. 318, 322. Ap-

proved by Lord Mansfield, Cowp 443. There appears to have been much difference of opinion at the time.

(*c*) 1 B. & S. 393, 30 L. J. Q. B. 265.

William Tweddle, the son of John Tweddle, brought an action against the executor of William Guy on this agreement, the declaration averring his relationship to the parties, and their intention to carry out a verbal agreement made before the plaintiff's marriage to provide a marriage portion. The action was held not to be maintainable. The Court did not in terms overrule the older cases to the contrary, considering that their authority was already sufficiently disposed of by the effect of modern decisions and practice (a).

The doctrines of equity are not so free from doubt. There is clear and distinct authority for these propositions: When two persons, for valuable consideration as between themselves, contract to do some act for the benefit of another person not a party to the contract—

Authorities in equity against right of third person.

(i) That person cannot enforce the contract against either of the contracting parties, at all events if not nearly and legitimately related to one of them (b) (*qu.* if not within the exception mentioned above, p. 194, in favour of children provided for by marriage settlements?).

(ii) But either contracting party may enforce it against the other although the person to be benefited had nothing to do with the consideration (c).

It seems reasonable to suppose, notwithstanding the want of express authority, that near relationship would not now be held to constitute of itself any ground of exception.

On the other hand the case of *Gregory v. Williams* (d) shows that a third person for whose benefit a contract is made may join as co-plaintiff with one of the actual contracting parties against the other, and insist on the arrangement being completely carried out. The facts of that case, so far as now material, may be stated as follows: Parker was indebted to Williams and also to Gregory; Williams, being informed by Parker that the debt to Gregory was about 900*l.*, and that there were no other debts, undertook to satisfy the debt to Gregory on

Authorities favouring it: *Gregory v. Williams* (third person co-plaintiff with contractee).

(a) See also *Price v. Easton*, 4 B. & Ad. 433. Much less can a stranger to a contract who has suffered damage by the non-performance of it sue the defaulting party for the damage: *Playford v. United Kingdom Electric Telegraph Co.*, L. R. 4

Q. B. 706, *Dickson v. Reuter's Telegram Co.*, 2 C. P. D. 62, in C. A. 3 C. P. D. 1.

(b) *Colyear v. Mulgrave*, 2 Kee. 81.

(c) *Davenport v. Bishopp*, 2 Y. & C. 451, 460, 1 Ph. 698, 704.

(d) 3 Mer. 582.

having an assignment of certain property of Parker's. Gregory was not a party to this arrangement, nor was it communicated to him at the time. The property having been assigned to Williams accordingly, the Court held that Gregory, suing jointly with Parker, was entitled to call upon Williams to satisfy his debt to the extent of 900*l.* (but not farther, although the debt was in fact greater) out of the proceeds of the property. It was not at all suggested that he could have sued alone in equity any more than at law (a).

Dictum in
Touche v.
Metropo-
litan, &c.,
Co.

A dictum in the recent case of *Touche v. Metropolitan Railway Warehousing Co.* (b), goes much further; for there it was said that "where a sum is payable by A.B. for the benefit of C.D., C.D. can claim under the contract as if it had been made with himself." But no such doctrine was necessary to the decision of the case. The suit was by promoters against the company. The articles of association of the company recited an arrangement with G. H. Walker that he should pay a sum to the promoters, and one of the articles provided that the directors should pay that sum to Walker in the event (which happened) of a certain number of shares being subscribed for and 2*l.* upon each paid up. Now this was in truth and substance an obligation embodied in the original constitution of the company to pay the sum in question to the promoters by Walker as the company's agent, and on this ground the decision, which at first sight looks anomalous, may well be supported (c).

No positive
decision
but enough
to create
doubt.

However when we consider the grounds on which the judgment was in fact based, and the earlier cases already referred to, it is impossible to say with confidence that the question how far third persons can acquire equitable rights under contracts and independent of trust is not to some extent unsettled. Another

(a) For an attempt of a third person to sue at law under very similar circumstances see *Price v. Easton*, 4 B. & Ad. 433, showing clearly that A. cannot sue on a promise by B. to C. to pay C.'s debt to A.

(b) 6 Ch. 671, 677.

(c) Mr. Justice Lindley (1. 410) seems to take this view of the case, which is also supported by the later

decision in *Eley v. Positive, &c., Life Assurance Co.* (C. A.) 1 Ex. D. 88, that a provision in articles of association that A. shall be solicitor to the company and transact all its legal business is as regards A. *res inter alios acta* and gives him no right against the company. See also *Melhado v. Porto Alegre Ry. Co.* L. R. 9 C. P. 503.

apparent or perhaps more than apparent exception is the case of *Page v. Cox* (a), where it was held that a provision in partnership articles that a partner's widow should be entitled to his share of the business might be enforced by the widow. But the decision was carefully put on the ground that the provision in the articles created a valid trust of the partnership property in the hands of the surviving partner.

We now come to the class of cases in which contracting parties have attempted for their own convenience to vest the right of enforcing the contract in a third person. Except within the domain of the stricter rules applicable to parties to actions on deeds and negotiable instruments, there appears to be no objection to several contracting parties agreeing that one of them shall have power to sue for the benefit of all except the party sued. Thus where partners create by agreement penalties to be paid by any partner who breaks a particular stipulation, they may empower one partner alone to sue for the penalty (b). The application of the doctrines of agency may also lead to similar results (c). It seems doubtful whether a promise to several persons to make a payment to one of them will of itself enable that one to sue alone (d).

But it is quite clear that the most express agreement of contracting parties cannot confer any right of action on the contract on a person who is not a party. Various devices of this kind have been tried in order to evade the difficulties that stand in the way of unincorporated associations enforcing their rights: and such devices, in Mr. Justice Lindley's words (e), "however ingenious, are utterly worthless. Attempts to enable

Third person empowered to sue for convenience of parties. Contracting parties can enable one of themselves to sue on behalf of himself and others:

But cannot enable a stranger. Attempts by unincorporated companies to appoint a nominal plaintiff.

(a) 10 Ha. 163.

(b) *Radenkurst v. Bates*, 3 Bing. 463, 470. Of course they must take care to make the penalty payable not to the whole firm, but to the members of the firm *minus* the offending partner. Whether under the present Rules of Court the other partners could use the name of the firm to sue for the penalty, *quære*.

(c) *Spurr v. Cass*, L. R. 5 Q. B. 656.

(d) *Chanter v. Leese*, 4 M. & W. 295; in Ex. Ch. 5 M. & W. 698, where both Courts inclined to think

not, but gave no decision. In *Jones v. Robinson*, 1 Ex. 454, 17 L. J. Ex. 36, an action was brought by one of two late partners against the purchaser of the business on a promise to pay the plaintiff what was due to him from the firm for advances. This was declared on as a separate promise in addition to a general promise to the two partners to pay the partnership debts, and the only question was whether there was any separate consideration for the promise sued on.

(e) Lindley on Partnership, 1. 508.

actions to be brought by the chairman for the time being of the directors of a company (*a*), by the directors for the time being of a company (*b*), by the purser for the time being of a cost-book company (*c*), by the managers of a mutual marine insurance society (*d*), have all been made in turn, and have all been made in vain." It will not be necessary to dwell on any instance other than the last. In *Gray v. Pearson* the reasons against allowing the right of action are well given in the judgment of Willes, J. :—

Judgment
of Willes,
J. in *Gray*
v. Pearson.

"I am of opinion that this action cannot be maintained, and for the simple reason,—a reason not applicable merely to the procedure of this country, but one affecting all sound procedure,—that the proper person to bring an action is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance in the case of agents, auctioneers, or factors, these exceptions are in truth more apparent than real. The persons who are suing here are mere agents, managers of an assurance association of which they are not members; and they are suing for premiums alleged to have become payable by the defendant in respect of policies effected by the plaintiffs for him, and for his share and contributions to losses and damages paid by them to other members of the association whose vessels have been lost or damaged. The bare statement of the facts is enough to shew that the action cannot be maintained.

"It is in effect an attempt to substitute a person as a nominal plaintiff in lieu of the persons whose rights have been violated."

Notes and
bills pay-
able to
treasurer,
&c., for
time being,
invalid.

Another variety of the same device is a document purporting to be a negotiable instrument payable to the treasurer or other officer for the time being of a society. Such a document, whether in the form of a promissory note (*e*) or of a bill of exchange (*f*), is invalid, for the payee must be a person capable of being ascertained at the time of making the note or accepting the bill. There is no doubt that a contract in any other form to pay the

(*a*) *Hall v. Bainbridge*, 1 Man. & Gr. 42.

(*b*) *Phelps v. Lyle*, 10 A. & E. 118.

(*c*) *Hybart v. Parker*, 4 C. B. N. S. 209, 27 L. J. C. P. 120 : where Willes, J. suggested that it was trenching upon the prerogative of the Crown to make a new species of corporation sole for the purpose of bringing actions.

(*d*) *Gray v. Pearson*, L. R. 5 C.

P. 568 : in the earlier case of *Gray v. Gibson*, L. R. 2 C. P. 120, a similar action succeeded, the question of the manager's right to sue not being raised.

(*e*) *Storm v. Stirling*, 8 E. & B. 832, 23 L. J. Q. B. 298 ; in Ex. Ch. nom. *Cowie v. Stirling*, 6 E. & B. 333, 25 L. J. Q. B. 335.

(*f*) *Yates v. Nash*, 8 C. B. N. S. 581, 29 L. J. C. P. 306.

treasurer for the time being would be equally inoperative to give any right of action to the person who should from time to time fill the office (a). But a promissory note payable to "the trustees of the W. chapel or their treasurer for the time being" is good: for it is considered that the trustees existing at the date of the note are the persons ascertained as payees, and that the treasurer is named only as their agent to receive payment (b).

Contrivances of this kind have not, so far as we know, come before our courts of equity; indeed their chief object has been to avoid the necessity of suing in equity. The Rules of the Supreme Court, following the former practice of the Court of Chancery, now provide that "where there are numerous persons having the same interest in one action, one or more of such parties may sue or be sued, or may be authorized by the Court to defend in such action, on behalf or for the benefit of all parties so interested" (c); but a person not really interested cannot be put forward as a representative (d).

Part 4. Assignment of Contracts.

Rule 4. We now come to the fourth rule, which we have expressed thus:—

Persons other than the creditor may become entitled by representation or assignment to stand in the creditor's place and to exercise his rights under the contract.

We need say nothing here about the right of personal representatives to enforce the contracts of the person they represent, except that it has been recognized from the earliest period of the history of our present system of law (e). With regard to assignment, the benefit of a contract cannot be assigned (except by the Crown) at common law so as to enable the assignee to sue in his own name (f). The origin of the rule was attributed by Coke to the "wisdom and policy of the founders of our law" in

Rule 4.
Transfer of
rights
under con-
tract.

Right to
sue on con-
tract not

(a) *Pigott v. Thompson*, 3 Bos. & P. 147.

(b) *Holmes v. Jaques*, L. R. 1 Q. B. 376.

(c) Order xvi. r. 9.

(d) Except to represent a defendant heir-at-law or next of kin in the cases provided for by Ord. xvi. r. 9a (June 1876). Cp. as to shareholders' suits *Forrest v. Manchester, &c., Ry. Co.*, 4 D. F. J. 126, *Robson v. Dodds*, 8 Eq. 301; dist. *Seaton v.*

Grant, 2 Ch. 459, *Bloxam v. Metropolitan Ry. Co.*, 3 Ch. 337.

(e) Subject to some technical exceptions which have now disappeared: see notes to *Wheatley v. Lane*, 1 Wms. Saund. 240 sqq. and for early instances of actions of debt brought by executors, Y. B. 20 & 21 Ed. 1, pp. 304, 374.

(f) *Termes de la Ley*, tit. *Chose in Action*.

assignable at common law : discouraging maintenance and litigation (a) : but there can be little or no doubt that it was in truth a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and the debtor (b). Anyhow, it has been long established that the proper course at common law is for the assignee to sue in the name of the assignor. It appears from the Year Books that attempts were sometimes made to object to actions of this kind on the ground of maintenance, but without success (c). The same rule is very distinctly stated by Gaius as prevailing in the Roman law (d).

In equity assignee may sue. In equity the right of the assignee to sue in his own name has been recognized for some considerable time ; it is perhaps impossible to say precisely for how long, but at any rate since the rules of equity have been at all systematic (e).

Legal right of assignee under Judicature Act, 1873. The Supreme Court of Judicature Act, 1873, (s. 25, sub-s. 6), creates a legal right modelled on the equitable right, but confined to cases where the assignment is absolute, and by writing under the hand of the assignor, and express notice in writing has been given to the debtor.

(a) *Lampet's ca.* 10 Co. Rep. 48a. For exposition of the rule in detail see Dicey on Parties, 115.

(b) Spence, Eq. Jurisd. of Chy. 2. 850. An examination of the earlier authorities has been found to confirm this view. The rule is assumed as unquestionable, and there is no trace of Coke's reason for it. The objection of maintenance was set up, not against the assignee suing in his own name, which was never attempted so far as we can find, but against his suing in the name of the assignor : see following note.

(c) Y. B. 9 H. 6. 64, pl. 17 ; 34 H. 6. 30, pl. 15 ; 15 H. 7. 2, pl. 3 ; Brooke, Abr. 140b. See Appendix B. to this chapter.

(d) Gai. 2. 38, 39. Quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo, quibus res corporales ad alium transferuntur, id efficere possum ; sed opus est, ut iubente me tu ab eo stipuleris : quae res efficit ut a me liberetur et incipiat tibi teneri. quae

dicatur novatio obligationis. Sine hac vero novatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri. In later times the transferee of a debt was enabled to sue by *utilis actio* in his own name. This seems to have been first introduced only for the benefit of the purchaser of an inheritance, D. 2. 14. de pactis, 16 *pr.*, C. 4. 39. de hered. vel act. vend. 1, 2, 4—6, and afterwards extended to all cases, C. eod. tit. 7, 9. See too C. 4. 10. de obl. et act. 1, 2, C. 4. 15. quando fiscus, 5, Arndts, Lehrbuch der Pandekten, § 254.

(e) There is a curious case in Y. B. 37 H. 6. 13, pl. 3, from which it seems that equitable assignments were then unknown (see p. 155 above). For collections of authorities on the modern doctrine of equitable assignments in general, see Lewin on Trusts, 575 sqq. ; Leake 601 ; and notes to *Ryall v. Rowles* in 2 Wh. & T. L. C.

These restrictions are but partly known in equity. By the Statute of Frauds (29 Car. 2, c. 3, s. 9) "all grants and assignments of any trust or confidence" must be in writing signed by the assignor, and by s. 7 equitable interests in *land* must be created by writing. S. 9 does not at all events require writing for the creation in the first instance by the legal owner or creditor of an equitable interest in personal property or a chose in action : and it may be argued perhaps that its operation is altogether confined to interests in land by the context in which it occurs. The writer is not aware of any decision upon it (a).

In equity more extensive : how far governed by Stat. of Frauds, qu.

As for the notice to the debtor, the rule of equity is that it must be express but need not be in writing (b).

There remain, therefore, a great number of cases where the right is purely equitable, although the enlarged jurisdiction of every branch of the Supreme Court makes the distinction less material than formerly.

Several partial exceptions to the common law rule have been made at different times by modern statutes, on which however it seems unnecessary to dwell. The more important instances are these :—

In other special cases by statute.

East India bonds, 51 Geo. 3, c. 64, s. 4, which makes them *negotiable*.

Mortgage debentures issued by land companies under the Mortgage Debenture Act 1865, 28 & 29 Vict. c. 78, amended by 33 and 34 Vict. c. 20.

Policies of life assurance : 30 & 31 Vict. c. 144.

Policies of marine assurance : 31 & 32 Vict. c. 86.

Things in action of companies (Companies Act 1862, s. 157) and bankrupts (Bankruptcy Act 1869, s. 111) assigned in pursuance of those acts respectively. As to the effect of registration under the present acts of previously existing companies, &c., in transferring the right to sue on the contracts made by the company or its officers in its former state, see the Companies Act 1862, s. 193, Lindley l. 507, note (u).

Local authorities (including any authority having power to levy a rate) may issue transferable debentures and debenture stock under the Local Loans Act 1875, 38 & 39 Vict. c. 83.

In ordinary cases rights under a contract derived by assign- Limitation of

(a) See 1 Sanders on Uses (5th ed.) 843.

(b) *Re Tichener*, 35 Beav. 317.

assignee's
rights.

ment from the original creditor are subject, as already stated, to the following limitations :—

1st. Title by assignment is not complete as against the debtor without notice to the debtor, and a debtor who performs his contract to the original creditor without notice of any assignment by the creditor is thereby discharged.

2nd. The debtor is entitled as against the representatives, and, *unless a contrary intention appears by the original contract*, [this modification has been introduced, as we shall see, by a series of quite recent decisions] as against the assignees of the creditor, to the benefit of any defence which he might have had against the creditor himself.

Rules of
equitable
assignment
in general.
Notice to
debtor.

1. As to notice to the debtor. Notice is not necessary to complete the assignee's equitable right as against the original creditor himself, or as against his representatives, including assignees in bankruptcy (a): but the claims of competing assignees or incumbrancers rank as between themselves not according to the order in date of the assignments, but according to the dates at which they have respectively given notice to the debtor. This was decided by the case of *Dearle v. Hall* and *Loveridge v. Cooper* (b), the principle of which was soon afterwards affirmed by the House of Lords (c). The same rule prevails in the modern civil law (d) and has been adopted from it in the Scottish law (e): and the true reason of it, though not made very prominent in the decisions which establish the rule in England, is the protection of the debtor. He has a right to look to the person with whom he made his contract to accept performance of it, and to give him a discharge, unless and until he is distinctly informed that he is to look to some other person. According to the original strict conception of contract, ("à ne considérer que la subtilité du droit" as Pothier (f) expressed it) his creditor or his creditor's assignee cannot even require him to do this, any more than in the converse but substantially different case a debtor can require his creditor to accept another person's liability, and his assent

(a) *Burn v. Carvalho*, 4 M. & Cr. 690.

(b) 3 Russ. 1, 38, 48.

(c) *Foster v. Cockerell*, 3 Cl. & F. 456.

(d) See Pothier, *Contrat de Vente*, §§ 560, 564 sqq.

(e) *Erskine Inst.* Bk. 3, Tit. 5.

(f) *Contrat de Vente*, § 550.

must be expressed by a novation (as to which see p. 189 above). Such was in fact the old Roman law, as is shown by the passage already cited from Gaius. By the modern practice the novation is dispensed with, and the debtor becomes bound to the assignee of whom he has notice. But he cannot be bound by any other assignment, though prior in time, of which he knows nothing. He is free if he has fulfilled his obligation to the original creditor without notice of any assignment; he is equally free if he fulfils it to the assignee of whose right he is first informed, not knowing either of any prior assignment by the original creditor or of any subsequent assignment by the new creditor (a). It is enough for the completion of the assignee's title "if notice be given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable or is merely charged with the duty of making the payment" (b) *e.g.* as an agent entrusted with a particular fund. Notice not given by the assignee may be sufficient, if shown to be such as a reasonable man would act upon (c). All this doctrine of notice has no application to interests in land (d): but, subject to that exception, it applies to rights created by trust as well as to those created by contract: the beneficial interest being treated for this purpose exactly as if it were a debt due from the trustee. In the case of trusts a difficulty may arise from a change of trustees: for it may happen that a fund is transferred to a new set of trustees without any notice of an assignment which has been duly notified to their predecessors, and that notice is given to the new trustees of some other assignment. It is still unsettled which of the assignees is entitled to priority in such a case: but it has been decided that the new trustees cannot be made personally liable for having acted on the second assignment (e).

This does not apply to interests in land; but does to all other equitable interests.

(a) See per Willes, J. L. R. 5 C. P. at p. 594. Per Knight Bruce, L. J. *Stocks v. Dobson*, 4 D. M. G. 11, 17.

(b) Per Lord Selborne, C. *Addison v. Cox*, 8 Ch. 76, 79.

(c) *Lloyd v. Banks*, 3 Ch. 488.

(d) Although the exception is fully established there is good authority for thinking it not very reasonable: see Lewin 581. Its effect is that equitable interests in land stand on a different footing from personal rights: see this re-

lied on as the ground of the exception, *Jones v. Jones*, 8 Sim. 644. But on the other hand their liability to be defeated by a purchase of the legal estate for value without notice shows that they have not the nature of real ownership.

(e) *Phipps v. Lovegrove*, 16 Eq. 80; see p. 90 as to the precautions to be taken by an assignee of an equitable interest who wishes to be perfectly safe.

The rules as to notice apply to dealings with future or contingent as well as with present and liquidated claims. "An insurance office might lend money upon a policy of insurance to a person who had insured his life, notwithstanding any previous assignment by him of the policy of which no notice had been given to them" (a).

Assignee takes subject to equities : double meaning of the rule.

2. As to the debtor's rights against assignees. The rule laid down in the second explanation is often expressed in the maxim "The assignee of an equity is bound by all the equities affecting it." This however includes another rule founded on a distinct principle, which is that no transaction purporting to give a beneficial interest apart from legal ownership (b) can confer on the person who takes or is intended to take such an interest any better right than belonged to the person professing to give it him. If A. contracts with B. to give B. something which he has already contracted to give to C., then C.'s claim to have the thing must prevail over B.'s, whether B. knew of the prior contract with C. or not. And if B. makes over his right to D., D. will have no better right than B. had (c). And this applies not only to absolute but to partial interests (such as equitable charges on property) to the extent to which they may affect the property dealt with. Again, by a slightly different application of the same principle, a creditor of A. who becomes entitled by operation of law to appropriate any beneficial interest of A.'s (whether an equitable interest in property or a right of action) for the satisfaction of his debt can claim nothing more than such interest as A. actually had, and he can gain no priority by notice to A.'s trustee or debtor even in cases where he might have gained it if A. had made an express and unqualified assignment to him (d). But we are not concerned here with the development of these doctrines, and we return to the other sense of the

(a) *Ib.* at p. 88.

(b) Certain dicta in *Sharpley v. Adams*, 32 Beav. 213, 216, and *Maxfield v. Burton*, 17 Eq. 15, 19, go even farther; but it seems at least doubtful whether they can be supported.

(c) See *Pinkett v. Wright*, 2 Ha. 120, *affd. nom. Murray v. Pinkett*, 12 Cl. & F. 784; *Ford v. White*, 16

Beav. 120; *Clack v. Holland*, 19 Beav. 262.

(d) *Pickering v. Ilfracombe Ry. Co.* L. R. 3 C. P. 235, overruling virtually *Watts v. Porter*, 3 E. & B. 743, 23 L. J. Q. B. 845, see *Crow v. Robinson*, L. R. 3 C. P. 264; judgment of Erle, J. (diss.) in *Watts v. Porter*.

general maxim. In that sense it is used in such judicial expressions as the following :

“ If there is one rule more perfectly established in a court of equity than another, it is this, that whoever takes an assignment of a chose in action takes it subject to all the equities of the person who made the assignment ” (a).

“ It is a rule and principle of this Court, and of every Court, I believe, that where there is a chose in action, whether it is a debt, or an obligation, or a trust fund, and it is assigned, the person who holds the debt or obligation, or has undertaken to hold the trust fund, has as against the assignee exactly the same equities that he would have as against the assignor ” (b).

This is in fact the same principle which is applied by courts of common law as well as of equity for the protection of persons who contract with agents not known to them at the time to be agents (c). What is meant by this special use of the term “ equities ” will be best shown by illustration. A debt is due from B. to A., but there is also a debt due from A. to B. which B. might set off in an action by A. In this state of things A. assigns the first debt to C. without telling him of the set-off. B. is entitled to the set-off as against C. (d). Again, B. has contracted to pay a sum of money to A. but the contract is voidable on the ground of fraud or misrepresentation. A. assigns the contract to C. who does not know the circumstances that render it voidable. B. may avoid the contract as against C. (e). Again, in a somewhat less simple case, there is a liquidated debt from B. to A. and a current account between them on which the balance is against A. A. assigns the debt to C. who knows nothing of the account. B. may set off as against C. the balance which is due on the current account when he receives notice of the assignment, but not any balance which becomes due afterwards (f).

(a) Lord St. Leonards, *Mangles v. Dixon*, 3 H. L. C. 702, 781.

(b) James, L. J. (sitting as V.-C.) *Phipps v. Lovegrove*, 16 Eq. 80, 88.

(c) See more on this in the Appendix A. to this chapter.

(d) *Cavendish v. Geaves*, 24 Beav. 163, 173, where the doctrine is fully expounded : the rules laid down by

the M. R. are given at length by Mr. Lewin, *Lewin on Tr.* 577. As to set-off accruing after notice of assignment, *Stephens v. Venable*, 30 Beav. 625, *Watson v. Mid Wales Ry. Co.*, L. R. 2 C. P. 593.

(e) *Graham v. Johnson*, 8 Eq. 36.

(f) *Cavendish v. Geaves*, 24 Beav. 163.

The rule may be excluded by agreement of original contracting parties. Asiatic Banking Corporation's case.

But it is open to the contracting parties to exclude the operation of this rule if they think fit by making it a term of the original contract that the debtor shall not set up against an assignee of the contract any counter claim which he may have against the original creditor. This is established by the decision of the Court of Appeal in Chancery in *Ex parte Asiatic Banking Corporation*, the facts of which have already been stated for another aspect of the case (a).

Two alternative grounds were given for the decision in favour of the claim of the Asiatic Banking Corporation under the letter of credit. One, which we have already noticed, was that the letter was a general proposal, and that there was a complete contract with any one who accepted it by advancing money on the faith of it. The other was that, assuming the original contract to be only with Dickson, Tatham, & Co. to whom the letter was given, yet the takers of bills negotiated under the letter were assignees of the contract, and it appeared to have been the intention of the original parties that the equities which might be available for the bank against Dickson, Tatham, & Co. should not be available against assignees.

“Generally speaking (said the L. J. Cairns) a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities.”

Where assignees of a chose in action are enabled by statute to sue at law, similar consequences may be produced by way of estoppel (b): which really comes to the same thing, the doctrine of estoppel being a more technical and definite expression of the same principle.

Subsequent decisions: form of instrument how far material.

The principle thus laid down has been followed out in several later decisions on the effect of transferable debentures issued by companies. The question whether the holder of such a debenture takes it free from equities is to be determined by the original intention of the parties.

(a) 2 Ch. 391; p. 184, *supra*.

(b) *Webb v. Herne Bay Commis-*

sioners, L. R. 5 Q. R. 642.

The form of the instrument is of course material, but the general tenor is to be looked to rather than the words denoting to whom payment will be made; these cannot be relied on as a sole or conclusive test.

Making a debenture payable to the holder or bearer does not necessarily mean more than that the issuing company will not require the holder who presents the instrument for payment to prove his title, especially if the object of the debenture is on the face of it to secure a specific debt (*a*). But an antecedent agreement to give debentures in such a form is evidence that they were meant to be assignable free from equities (*b*); and debentures payable to bearer without naming any one as payee in the first instance are *prima facie* so assignable (*c*); so again if the document resembles a negotiable instrument rather than a common money bond or debenture in its general form (*d*).

Even when there is nothing on the face of the instrument to show the special intention of the parties, the issuer cannot set up equities against the assignee if the instrument was issued for the purpose of raising money on it (*e*). The general circumstances attending the original contract—*e.g.* the issue of a number of debentures to a creditor instead of giving a single bond or covenant for the whole amount due—may likewise be important. Moreover, apart from any contract with the original creditor, the issuing company may be estopped from setting up equities against assignees by subsequent recognition of their title (*f*).

The rule extends to an order for the delivery of goods as well as to debentures or other documents of title to a debt payable in money (*g*).

(a) *Financial Corporation's claim*, 3 Ch. 355, 360.

(b) *Ex parte New Zealand Banking Corporation*, 3 Ch. 154.

(c) *Ex parte Colborne & Strawbridge*, 11 Eq. 478, which cannot now be taken as warranting anything beyond the statement in the text, cp. *Crouch v. Crédit Foncier*, L. R. 8 Q. B. 374, 385.

(d) *Ex parte City Bank*, 3 Ch. 758.

(e) *Dickson v. Swansea Vale Ry. Co.* L. R. 4 Q. B. 44. *Graham v. Johnson*, 8 Eq. 36, seems not con-

sistent with this.

(f) *Higgs v. Northern Assam Tea Co.* L. R. 4 Ex. 387; *Ex parte Universal Life Assurance Co.* 10 Eq. 458 (on same facts); *Ex parte Chorley*, 11 Eq. 157: cp. *Re Bahia & San Francisco Ry. Co.* L. R. 8 Q. B. 584. *Qu. can Athenæum Life Assurance Soc. v. Pooley*, 3 De G. & J. 294, be reconciled with these cases? It seems not: *Brunton's claim*, 19 Eq. 302, 312.

(g) *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* 5 Ch. D. 205.

Qu. when
the original
contract is
voidable.

It may be doubted whether this doctrine can apply in a case where the original contract is not merely subject to a cross claim but voidable. For the agreement that the contract shall be assignable free from equities is itself part of the contract, and one would think it should have no greater validity than the rest. A collateral contract for a distinct consideration might be another matter: but the notion of making it a term of the contract itself that one shall not exercise any right of rescinding it that may afterwards be discovered seems to involve the same kind of fallacy as the sovereign power in a state assuming to make its own acts irrevocable. Nor does it make any difference, so long as we adhere to the general rules of contract, that the stipulation is in favour not of the original creditor but only of his assignees (*a*). However the point has not been distinctly raised in any of the decided cases. In *Graham v. Johnson* (*b*), where the contract was originally voidable (*qu.* if not altogether void, the plaintiff having executed a bond under the impression that he was accepting or indorsing a bill of exchange) (*c*), an assignee of the bond as well as the obligee was restrained from enforcing the bond: but the decision was rested on the somewhat unsatisfactory ground that, although the instrument was given for the purpose of money being raised upon it, there was no intention expressed on the face of it that it should be assignable free from equities.

However, if the contract were not enforceable as between the original parties only by reason of their being *in pari delicto*, as not having complied with statutory requirements or the like, an assignee for value without notice of the original defect will at all events have a good title by estoppel (*d*).

Limits to
what can
be done by
agreement
of parties:
contract
cannot be

The transferable debentures the effect of which came in question in the cases we have just reviewed were no doubt intended to be equivalent to negotiable instruments, and there have been dicta in the Court of Chancery favouring the view that they were such in fact (*e*). But a later decision of the

(*a*) In principle it is the same as the case put in the Digest (50. 17, de reg. iuris, 23) "non valere si convenerit, ne dolus praestetur."

(*b*) 8 Eq. 36.

(*c*) The evidence was conflicting,

but the Court took this view of the facts: see p. 43.

(*d*) See *Webb v. Herne Bay Commissioners*, L. R. 5 Q. B. 642.

(*e*) See especially *Ex parte City Bank*, 3 Ch. 758.

Court of Queen's Bench shows that this intention cannot be made negotiable : fully carried out. The debtor may contract in such a way as to Crouch v. alter or abandon his own rights as against assignees of the con- Crédit Foncier. tract ; but he cannot alter or abandon the rights of subsequent assignees, and therefore cannot enable an intermediate transferor having no title to give a good title to his transferee (a).

This marks the extreme limit of the extension which can be given to the power of transferring rights under a contract consistently with the general rules of law.

We are now in a position to see the nature of the difficulties Negotiable instru- which make the mere assignment of a contract inadequate for ments. the requirements of commerce, and to meet which negotiable Difficulties of assignee instruments have been introduced. of ordinary contract.

The assignee of a contract is under two inconveniences (b). The first is that he may be met with any defence which would have been good against his assignor. This, we have seen, may to a considerable extent if not altogether be obviated by the agreement of the original contracting parties.

The second is that he must prove his own title and that of the intermediate assignees, if any ; and for this purpose he must inquire into the title of his immediate assignor. This can be in part, but only in part, provided against by agreement of the parties.

It is quite competent for them to stipulate that as between themselves payment to the holder of a particular document shall be a good discharge ; but such a stipulation will neither affect the rights of intermediate assignees nor enable the holder to compel payment without proving his title. Parties cannot set up a market overt for contractual rights.

The complete solution of the problem, for which the ordinary Remedy law of contract is inadequate, is attained by the law merchant (c) by special rules of law merchant. in the following manner :—

(i) The absolute benefit of the contract is attached to the ownership of the document which according to ordinary rules would be only evidence of the contract.

(a) *Crouch v. Crédit Foncier of England*, L. R. 8 Q. B. 374.

(b) Cp. Savigny, Obl. § 62.

(c) Extended to promissory notes by statute : 3 & 4 Anne c. 8 (in Rev. Stat.) ss. 1-3.

(ii) The proof of ownership is then facilitated by prescribing a mode of transfer which makes the instrument itself an authentic record of the successive transfers: this is the case with instruments transferable by indorsement.

(iii) Finally this proof is dispensed with by presuming the *bona fide* possessor of the instrument to be the true owner: this is the case with instruments transferable by delivery, which are negotiable in the fullest sense of the word.

Negotiable
instru-
ments. Pe-
culiar and
extensive
rights of
bona fide
holder.

The result is that the contract is completely embodied (a) for all practical purposes in the instrument which is the symbol of the contract; and both the right under the contract and the property in the instrument are treated in a manner quite at variance with the general principles of contract and ownership. We give references to a few passages where specimens will be found of the positive terms in which the privileges of *bona fide* holders of negotiable instruments have been repeatedly asserted by the highest judicial authority (b).

The narrower doctrine which for a time prevailed, requiring a certain measure of caution on the part of the holder, is now completely exploded. Nothing short of actual knowledge of the facts affecting his transferor's title will defeat the holder's right (c).

Moreover there is no discrepancy between common law and equity in this matter. Equity has interfered in certain cases of forgery and fraud to restrain negotiation; but at law no title to sue on the instrument can be made through a forgery (d); and "the cases of fraud where a bill has been ordered to be given up are confined to those where the possession, but for the fraud, would be that of the plaintiff in equity" (e). The rights of *bona fide* holders for value are as fully protected in equity as at common law, and against such a holder equity will not interfere (f).

(a) "Verkörperung der Obligation," Savigny.

(b) See per Byles, J. *Swan v. N. B. Australasian Co.* in Ex. Ch. 2 H. & C. 184, 31 L. J. Ex. 425; per Lord Campbell, *Brandao v. Barnett*, 12 Cl. & F. 105; opinion of Supreme Court, U. S. delivered by Story, J. *Swift v. Tyson*, 16 Peters 1, 15.

(c) *Goodman v. Harrey*, 4 A. & E. 876, *Raphael v. Bank of England*,

17 C. B. 161, 175, 25 L. J. C. P. 33.

(d) The *bona fide* holder of an instrument with a forged indorsement may be exposed to considerable hardship. See *Bobbett v. Pinkett*, 1 Ex. D. 368.

(e) *Jones v. Lane*, 3 Y. & C. Ex. in Eq. 281, 293.

(f) *Thiedemann v. Goldschmidt*, 1 D. F. J. 4.

The most frequent examples of negotiable instruments are bills of exchange and promissory notes. Their exceptional qualities are concisely stated in the recent case of *Crouch v. Crédit Foncier of England* (a) which has been already referred to :—

Qualities
of nego-
tiable in-
struments.
Limiting
rules in
Crouch v.
Crédit
Foncier.

“ Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who, by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it.”

We may here notice the positions contained in the judgment of the Court, which in fact show the limits beyond which the special law of English negotiable instruments cannot be extended.

1. It is extremely doubtful whether the seal of a corporation can be treated as equivalent to signature for the purpose of making an instrument under it negotiable at common law (b).

2. A bond containing a contract not merely to pay the principal but to cause the bonds to be drawn for payment in a specified manner cannot be negotiable, since it violates the general rule that the contract to pay must be unconditional. (It must also be a contract to pay money or to deliver another negotiable security representing money (c) : therefore a promise in writing to deliver 1000 tons of iron to the bearer is not negotiable and gives no right of action to the possessor) (d).

3. Mere private agreement or *particular* custom cannot be admitted as part of the law merchant so as to introduce new kinds of negotiable instruments. But the fact that a *universal*

(a) L. R. 8 Q. B. 374.

(b) But if a corporation is expressly enabled by statute to issue promissory notes under seal they may be sued on as ordinary promissory notes : *Slark v. Highgate Archway Co.* 5 Taunt. 792, and in any case the addition of the seal will not prevent an instrument from being a good bill or note if it is also signed by an agent or agents for the company so that it would be good without the seal, which may perhaps be regarded as an ear-mark or memorandum made by the company or its agents for their own convenience: see *Halford v. Cameron's*

Coalbrook, &c., Co. 16 Q. B. 442, 20 L. J. Q. B. 160, *Aggs v. Nicholson*, 1 H. & N. 165, 25 L. J. Ex. 348, *Balfour v. Ernest*, 4 C. B. N. S. 601, 28 L. J. C. P. 170, *Dutton v. Marsh*, L. R. 6 Q. B. 361.

(c) *Goodwin v. Roberts*, Ex. Ch., L. R. 10 Ex. 337, in H. L. 1 App. Ca. 476.

(d) *Dixon v. Bovill*, 3 Macq. 1, and see Byles on Bills, Ch. 7. Such a contract may however be made assignable free from equities : *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* 5 Ch. D. 205.

mercantile usage is modern is no reason against its being judicially recognized as part of the law merchant. The notion that general usage is insufficient merely because it is not ancient is founded on the erroneous assumption that the law merchant is to be treated as fixed and invariable (*a*).

The bonds of foreign governments issued abroad and treated in the English market as negotiable instruments are recognized as such by law (*b*). So is the provisional scrip issued in England by the agent of a foreign government as preparatory to giving definitive bonds (*c*). Such bonds or scrip, and other foreign instruments negotiable by the law of the country where they are made, may be recognized as negotiable by our Courts though they do not satisfy all the conditions of an English negotiable instrument (*d*).

Negoti-
ability by
estoppel.

From what was said in *Goodwin v. Roberts* (*e*) in the House of Lords it seems that where the holder of an instrument purporting on the face of it to be negotiable, and in fact usually dealt with as such, intrusts it to a broker or agent who deals with it in the market where such usage prevails, he is estopped from denying its negotiable quality as against any one who in good faith and for value takes it from such broker or agent.

How in-
struments
may cease
to be nego-
tiable.

It is also to be observed that an instrument which has been negotiable may cease to be so in various ways, namely—

Payment by the person ultimately liable (*f*).

Restrictive indorsement (*g*).

Crossing with the words “not negotiable,” under the Crossed Cheques Act 1876, 39 & 40 Vict. c. 81. A person taking a cheque so crossed has not and cannot give a better title than the person from whom he took it: s. 12.

To a certain extent, in the case of bills payable to order, indorsement when overdue, which makes the indorsee's rights subject to what are called equities attaching to the bill itself, *e.g.* an agreement between the original parties to the bill that in

(*a*) *Goodwin v. Roberts*, *supra*, overruling *Crouch v. Crédit Foncier* on this point; *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194.

(*b*) *Gorgier v. Mievill*, 3 B. & C. 45.

(*c*) *Goodwin v. Roberts*, L. R. 10 Ex. 76, *affd.* in Ex. Ch. *ib.* 337, in H. L. 1 App. Ca. 476.

(*d*) See *Crouch v. Crédit Foncier*,

L. R. 8 Q. B. at pp. 384-5; *Goodwin v. Roberts*, 1 App. Ca. at pp. 494-5.

(*e*) 1 App. Ca. 486, 489, 493, 497.

(*f*) *Lazarus v. Cowie*, 3 Q. B. 464.

As to the possibility of suing on a bill after it has been paid by some other person, see *Cook v. Lister*, 13 C. B. N. S. 594, 32 L. J. C. P. 121.

(*g*) 1 Sm. L. C. 479.

certain events the acceptor shall not be held liable, but not to collateral equities such as set-off (*a*).

It has here been our business only to note in a very general way how the law of negotiable instruments oversteps the ordinary law of contract, and within what limits it is applied. It seems therefore unadvisable to enter further upon the special characteristics of the contracts involved in such instruments; but it may not be useless to annex references to some modern cases in which the nature of the contracts undertaken in a bill of exchange by the drawer, acceptor, and indorsers respectively, has been judicially defined or discussed (*b*): the bill of exchange being that type of negotiable instrument which is most frequent, most important, and most fully developed.

We have purposely left to the last the consideration of certain important classes of contracts which may be roughly described as involving the transfer of duties as well as of rights. This happens in the cases

(A) Of transferable shares in partnerships and companies.

(B) Of obligations (*c*) attached to ownerships or interests in property.

Transfer of contracts where duties as well as rights transferred.

A. The contract of partnership generally involves personal confidence, and is therefore of a strictly personal character. But, as Mr. Justice Lindley tells us, "if partners choose to agree that any of them shall be at liberty to introduce any other person into the partnership, there is no reason why they should not; nor why, having so agreed, they should not be bound by the agreement" (*d*). At common law the number of persons engaged in a contract of partnership does not make any difference in the nature or validity of the contract; hence it follows that if in a partnership of two or three the share of a partner may be transferred on terms agreed on by the original partners, there is nothing at common law to prevent the same arrangement from being made in the case of a larger partnership, however numerous the members may be; in other words, unincorporated

(A.) Partnerships: Shares in ordinary partnerships and unincorporated companies may be made transferable at common law.

(a) See *Ex parte Swan*, 6 Eq. 344, 359, where the authorities are discussed.

(b) As to contracts of acceptor and drawer, see *Jones v. Broadhurst*, 9 C. B. 173, 181, *Lebel v. Tucker*, L. R. 3 Q. B. 77, 84. As to the contract of an indorser, *ib.* at p. 83,

Denton v. Peters, L. R. 5 Q. B. 475, 477.

(c) We use the word here in its wide sense so as to denote the benefit or burden of a contract, or both, according to the nature of the case.

(d) Lindley, l. 719.

companies with transferable shares are not unlawful at common law. This is worked out by Mr. Justice Lindley in another part of his book, where he shows by an ingenious and convincing analysis that such a conclusion is demanded by principle, and by an examination of decided cases that it is consistent with authority (a). "Those who form such partnerships, [*i.e.* partnerships whether small or large in which shares are transferable] and those who join them after they are formed, assent to become partners with any one who is willing to comply with certain conditions" (b).

But no
uncertain
contract
and no real
anomaly
in this.

At first sight this may seem to involve the anomaly of a floating contract between all the members of the partnership for the time being, who by the nature of the case are unascertained persons when we look to any future time (c). It is somewhat curious that this line of objection does not appear to have been distinctly taken in any of the cases in which the legality of such undertakings was discussed: the history of the Bubble Act and the decisions on it rather goes to show that it was not supposed that the kind of partnership contracts forbidden by that Act might be already invalid at common law on such grounds as here suggested. However there is really no need to assume any special exception from the ordinary rules of contract, and therefore no ground of objection. In addition to Mr. Justice Lindley's reasons another has been given by Lord Westbury, which is very differently expressed, but is consistent enough with them and may be taken as supplemental to them. The transfer of a share in a partnership at common law is strictly not the transfer of the outgoing partner's contract to the incoming partner, but the formation of a new contract. "By the ordinary law of partnership as it existed previously to" the Companies Acts "a partner could not transfer to another person his share in the partnership. Even if he attempted to do so with the consent of the other partners, it would not be a transfer of his share, it would in effect be the creation of a new partnership" (d). This therefore is to be added to the cases in which we have already found apparent anomalies to vanish on closer examination.

Practical

Notwithstanding the theoretical legality of unincorporated

(a) Lindley, 1. 196-201.

(b) *Ib.* 1. 719.

(c) Cp. per Abbott, C. J. in

Josephs v. Pebrer, 3 B & C. 639, 643

(d) *Webb v. Whiffin*, L. R. 5 H. L.

711, 727.

companies, there does not appear to be any very satisfactory way of enforcing either the claims of the company against an individual member (*a*), or those of an individual member against the company (*b*). But the power of forming such companies is so much cut short by the Companies Act 1862, which renders (with a few exceptions) unincorporated and unprivileged (*c*) partnerships of more than twenty (*d*) persons positively illegal, that questions of this kind are not likely to have much practical importance in future. In like manner the transfer of shares in companies as well as their original formation is almost entirely governed by modern statutes.

difficulties of unincorporated companies would remain, even apart from compulsory provisions of Companies Act.

B. Obligations *ex contractu* attached to ownership or interests in property are of several kinds. With regard to those attached to estates and interests in land, which alone offer any great matter for observation, the discussion of them in detail is usually and conveniently treated as belonging to the law of real property. We shall have to dwell on them however so far as to point out the existence of a real conflict between common law and equity as to the right way of dealing with burdens imposed on the use of land by contract.

Obligations attached to property.

A general statement in a summary form will serve both to shorten our subsequent remarks and to make them better understood.

OBLIGATIONS ATTACHED TO OWNERSHIP AND INTERESTS IN PROPERTY.

General view thereof.

I. Goods.

A contract cannot be annexed to goods so as to follow the property in the goods either at C. L. (*e*) or in Equity (*f*).

By statute 18 & 19 Vict. c. 111 the indorsement of a bill of lading operates as a legal transfer of the contract, if and whenever by the law merchant it operates as a transfer of the property in the goods.

(*a*) We have seen (*supra*, p. 199) that they cannot empower an officer to sue on behalf of the association.

(*b*) See *Lyon v. Haynes*, 5 M. & Gr. 504, Lindley 2. 929.

(*c*) i.e. such as but for the Act would have been mere partnerships at common law.

(*d*) Ten in the case of banking: Companies Act 1862, s. 4, see Lindley, 1. 170, 203; as to transfer

of shares, *ib.* 721-727; as to termination of shareholders' liability, *ib.* 476-481.

(*e*) 3rd resolution in *Spencer's* ca. 1 Sm. L. C. 60; *Splidt v. Bowles*, 10 East 279. Leake on Contracts, 624. "In general contracts do not by the law of England run with goods": Blackburn on Sale, 276.

(*f*) *De Mattos v. Gibson*, 4 De G. & J. 276, 295.

II. Land (a).

a. Relations between landlord and tenant on a demise.

Burden :

of lessee's covenants

As to an existing thing parcel of the demise, assignees are bound whether named or not.

As to something to be newly made on the premises, assignees are bound only if named (b).

of lessor's covenants

runs with the reversion.

(32 Hen. 8. c. 34.)

Benefit :

of lessee's covenants

runs with the reversion.

(32 Hen. 8. c. 34.)

But the stat. applies only to demises under seal (c), and includes (by construction in *Spencer's ca.*) only such covenants as *touch and concern the thing demised* (d).

of lessor's covenants

runs with the tenancy.

Note.

(i) The lessee may safely pay rent (e) to his lessor so long as he has no notice of any grant over of the reversion : 4 & 5 Anne c. 3 [in Rev. Stat. : *al.* 4 Ann. c. 16] which is in fact a declaration of the C. L. : see per Willes, J., L. R. 5 C. P. 594.

(ii) The lessee may still be sued on his express covenants (though not *in debt* for rent) after an assignment of the term (f).

(iii) The doctrine concerning a reversion in a term of years is the same as concerning a freehold reversion (g).

β. Mortgage debts.

The transfer of a mortgage security operates *in equity* as a transfer of the debt (h). Notice to the mortgagor is not needed

(a) On this generally see Dart V. & P. 2. 764 sqq. ; 3d Report of R. P. Commission, Dav. Conv. 1. 122 (4th ed.) ; and above all the notes to *Spencer's ca.* in 1 Sm. L. C. : and also as to covenants in leases the notes to *Thursby v. Plant*, 1 Wms. Saund. 278-281, 299, 305.

(b) As to this distinction, see 1 Sm. L. C. 74-77. Whether a covenant not to assign without licence "extends to a thing *in esse* parcel of the demise," so as to bind assignees though not named, *quære* : *ib.* 76.

(c) *e.g.* *Smith v. Eggington*, L. R. 9 C. P. 145.

(d) For the meaning of this see 1 Sm. L. C. 72.

(e) In the case of the lessee's covenants other than for payment of rent, an assignee of the reversion is not bound to give notice of the assignment to the lessee as a condition precedent to enforcing his rights : *Scaltock v. Harston*, 1 C. P. D. 106.

(f) 1 Sm. L. C. 77, 1 Wms. Saund. 298.

(g) 1 Sm. L. C. 70.

(h) This is one of the cases in which the equitable transfer of a debt is not made = a legal transfer by the Judicature Act, 1873. In practice an express assignment of the debt is always added.

to make the assignment valid; but without such notice the assignee is bound by the state of the accounts between mortgagor and mortgagee (a).

γ. Rent-charges and annuities imposed on land independently of tenancy or occupation (b).

An agreement to grant an annuity charged on land implies an agreement to give a personal covenant for payment (c): but by a somewhat curious distinction the burden of a covenant to pay a rent-charge does *not* run with the land charged, nor does the benefit of it run with the rent (d).

δ. Other covenants not between landlord and tenant, relating to land and entered into *with* the owner of it.

The benefit runs with the covenantee's estate so that an assignee can sue at common law. It is immaterial whether the covenantor was the person who conveyed the land to the covenantee or a stranger (e). The usual vendor's covenants for title come under this head.

ε. The like covenants entered into *by* the owner.

The burden of such covenants appears on the whole *not* to run with the land in any case at common law (f). But where a right or easement affecting land—such as a right to get minerals free from the ordinary duty of not letting down the surface—is granted subject to the duty of paying compensation for damage done to the land by the exercise of the right, there the duty of paying compensation runs at law with the benefit of the grant. Here, however, the correct view seems to be that the right itself is a qualified one—viz. to let down the surface, &c., paying compensation and not otherwise (g).

The burden *does* run with the land in Equity, i.e. a court of

(a) *Jones v. Gibbons*, 9 Ves. 407, 411; *Matthews v. Wallwyn*, 4 Ves. 118, 126.

(b) These must be regarded as arising from contract (we do not speak of rents or services incident to *tenure*): the treatment of rent-charges in English law as real rights or incorporeal hereditaments seems arbitrary. For a real right is the power of exercising some limited part of the rights of ownership, and is quite distinct from the right to receive a fixed payment without the immediate power of doing any act of ownership on the property on which the payment is secured.

(c) *Bower v. Cooper*, 2 Ha. 408.

(d) 1 Wms. Saund. 303, 1 Sm.

L. C. 77.

(e) *Contra Sugd. V. & P.* 584-5. But see 1 Sm. L. C. 80, Dart 778, Dav. Conv. 1. 137. The cases from the Year Books relied on by Lord St. Leonards (*Pakenham's ca.* H. 42 E. 3. 3, pl. 14, *Horne's ca.* M. 2 H. 4. 6, pl. 25) seem to show only that it was once thought doubtful whether the assignee could sue without being also *heir* of the original covenantee. See also 11 Amer. Law Rev. 658, 659.

(f) 3rd report of R. P. Commissioners, in 1 Dav. Conv. *Contra Cooke v. Chilcott*, 3 Ch. D. 694.

(g) *Aspden v. Seddon* (C. A.), 1 Ex. D. 496, 509.

equity will enforce the covenant against assignees who have actual or constructive (a) notice of it : and when the covenant is for the benefit of other land (as in practice is commonly the case) the benefit generally though not always runs with that other land.

Explanation. Let us call the land on the use of which a restriction is imposed by covenant the *quasi-servient* tenement, and the land for whose benefit it is imposed the *quasi-dominant* tenement. Now restrictive covenants may be entered into

(1) By a vendor as to the use of other land retained or simultaneously sold, for the benefit of the land sold by him :

In this case the burden runs with the quasi-servient tenement and the benefit also runs with the quasi-dominant tenement.

(2) By a purchaser as to the use of the land purchased by him, for the benefit of other land retained or simultaneously sold by the vendor :

In this case the burden runs with the quasi-servient tenement, and the benefit *may* run with the quasi-dominant tenement when such is the intention of the parties, and especially when a portion of land is divided into several tenements and dealt with according to a prescribed plan (b).

All these rights and liabilities being purely equitable are like all other equitable rights and liabilities subject to the rule that purchase for value without notice is an absolute defence.

Further
remarks :
as to bills
of lading.

The only points which seem to call for more notice here are the doctrines as to bills of lading (I) and restrictive covenants as to the use of land (II. ε).

As to (I) it is to be borne in mind that bills of lading are not properly negotiable instruments, though they may be called so "in a limited sense as against stoppage *in transitu* only" (c). As far as the law merchant goes the bill of lading only represents the goods, and does not enable any one who gets it into his hands to give a better title than his own to a transferee ; "the transfer of the symbol does not operate more than a transfer of what is represented" (d). And the whole effect of the statute is to attach the rights and liabilities of the shipper's contract not to the symbol, but to the property in the goods

(a) *Wilson v. Hart*, 1 Ch. 463.

(b) *Keates v. Lyon*, 4 Ch. 218 and other cases there considered. *Harrison v. Good*, 11 Eq. 328.

(c) Per Willes, J. *Puentes v. Montis*, L. R. 3 C. P. at p. 276.

(d) *Gurney v. Behrend*, 3 E. & B. 622, 633, 23 L. J. Q. B. 265.

themselves (a) : the right to sue on the contract contained in the bill of lading is made to "follow the property in the goods therein specified ; that is to say, the legal title to the goods as against the indorser" (b).

As to (II. ε) we have to explain the discrepance between common law and equity, which is a real and serious one. The theory of the common law is to the following effect. The normal operation of a contract, as we have already had occasion to say, is to limit or cut short in some way the contracting party's control over his own actions. Among other kinds of actions the exercise of rights of ownership over a particular portion of property may be thus limited. So far then an owner "may bind himself by [personal] covenant to allow any right he pleases over his property" (c) or to deal with it in any way not unlawful or against public policy (d). But if it be sought to annex such an obligation to the property itself, this is *prima facie* a considerable departure from the ordinary rules of contract, and to be justified only by clear convenience. How then does the matter stand in this respect? An obligation attached to property in this manner ceases to be only a burden on the freedom of the contracting party's individual action, and becomes practically a burden on the freedom of ownership. Now the extent to which the law regards such burdens as convenient is already defined. Certain well-known kinds of permanent burdens are imposed by law, or may be imposed by the act of the owner, on the use of land, for the permanent benefit of other land : these, and these only, are recognized as being necessary for the ordinary convenience of mankind, and new kinds cannot be admitted. And this principle, it may be observed, is not peculiar to the law of England (e). Easements and other real rights *in re aliena* cannot therefore be extended at the arbitrary discretion of private owners : "it is not competent for an

As to burden of covenants running with land : real conflict between C. L. and equity on this. Treatment of the question at C. L.

(a) *Fox v. Nott*, 6 H. & N. 630, 636, 30 L. J. Ex. 259 ; *Smurthwaite v. Wilkins*, 11 C. B. N. S. 842, 850, 31 L. J. C. P. 214.

(b) *The Freedom*, L. R. 3 P. C. 594, 599.

(c) *Hill v. Tupper*, 2 H. & C. 121, 127, 32 L. J. Ex. 217.

(d) It is not unlawful for a land-

owner to let all his land lie waste ; but a covenant to do so would probably be invalid.

(e) Cp. Savigny Obl. 1. 7 : and for a singular coincidence in detail D. 8. 3. de serv. praed. rust. 5 § 1, 6 pr. = *Clayton v. Corby*, 5 Q. B. 415, 14 L. J. Q. B. 364.

owner of land to render it subject to a new species of burden at his fancy or caprice" (a). Still less, of course, is it competent for people to create new kinds of tenure or to attach to property incidents hitherto unknown to the law. But if it is not convenient or allowable that these things should be done directly in the form of unheard of easements or the like, neither can we hold it convenient or allowable that they should be done indirectly in the form of obligations created by contract but annexed to ownership. If the burden of restrictive covenants is to run with land, people can practically create new easements and new kinds of tenure to an indefinite extent. Such appears to be the view of legal policy on which the common law doctrine rests: we say of legal policy, for it would be a great mistake to treat the matter as one of merely technical distinctions.

In Equity. On the other hand the Court of Chancery has treated the question differently, looking not so much at general policy as at individual rights. An owner of land has bound himself by contract to limit his use of that land in a particular manner: why should his successors in title not be bound also, save in the case of a purchase for value without notice of the restriction? It is no hardship on them; for those who buy the land subject to the restriction will pay so much the less, and the intention of the parties would be frustrated if contracts of this kind were considered merely personal. The history of the doctrine is somewhat curious. Lord Brougham adopted and enforced what we have called the common law theory in an elaborate judgment which seems to have been intended to settle the question (b). But this judgment, though treated as an authority in courts of law (c), has never been followed in courts of equity. After being disregarded in two reported cases (d) it was overruled by

(a) Per Martin, B. *Nuttall v. Bracewell*, L. R. 2 Ex. 10; for the C. L. principles generally see *Ackroyd v. Smith*, 10 C. B. 164, 19 L. J. C. P. 315; *Bailey v. Stephens*, 12 C. B. N. S. 91, 31 L. J. C. P. 226. Rights of this kind are to be carefully distinguished from those created by grants in gross: see per Willes

J. *ib.* 12 C. B. N. S. 111.

(b) *Keppel v. Bailey*, 2 M. & K. 527.

(c) *Hill v. Tupper*, 2 H. & C. 121, 32 L. J. Ex. 217.

(d) *Whatman v. Gibson*, 9 Sim. 196 (1838); *Mann v. Stephens*, 15 Sim. 377 (1846); *Keppel v. Bailey* was in 1834.

Lord Cottenham in *Tulk v. Moxhay* (a), now the leading case on the subject. The most important of the recent cases are *Keates v. Lyon* (b) (where the authorities are collected) and *Harrison v. Good* (c). This last decided that when a vendor sells land in building lots and takes restrictive covenants in identical terms from the several purchasers, neither reserving any interest nor entering into any covenant himself, this will enable the owner for the time being of one lot under the title thus created to enforce the covenant in equity against the owner of another lot: nor can the vendor release the covenant to any purchaser or his successors in title without the consent of all the rest. Thus the practical result is that a great variety of restrictions on the use of land which could not be imposed by way of easement or the like may be imposed by way of covenant for an indefinite length of time, purchases for value without notice of the restriction being obviously not probable events. So far as courts of equity have omitted to consider whether such a result is consistent with the general principles of the law concerning the tenure and enjoyment of property, perhaps it may be said that the view they have taken is really the more technical of the two.

According to the doctrine of equity, the intention of the parties is to fix an obligation to deal with the land in a particular manner not merely on the original contracting party, but on his successors in title: then why not give effect to that intention? The common law doctrine admits that such is the intention, but refuses to give effect to it because it tends to multiply undue restrictions on the freedom of ownership, in contravention of the general spirit of the law (d). But the real question involved in this conflict is in truth of an economic rather than a legal kind: namely whether it is or is not desirable that private persons should have the power of dedicating land to be used in a particular way for an indefinite time. Such questions of public economy cannot be adequately dealt with by means of the

The question is at bottom one of policy not of law.

(a) 2 Ph. 774. See per Fry, J. in *Luker v. Dennis*, 7 Ch. D. at p. 235. *Hansard*, 4 Ch. D. 718.
 (b) 4 Ch. 218. (d) See the observations of the Court of Ex. Ch. in *Dennett v. Atherton*, L. R. 7 Q. B. 325.
 (c) 11 Eq. 338, dist. *Mater v.*

rules of ordinary private law concerning ownership and contract, and we need not be surprised if the purely legal discussion of them fails to give satisfactory results (*a*).

APPENDIX A. (See p. 192 above.)

As to Parties to Actions on Contracts made with Agents.

A person who contracts or professes to contract on behalf of a principal may be in any one of the following positions :

1. Agent having authority (whether at the time or by subsequent ratification) to bind his principal.

(A) known to be an agent

(*a*) for a principal named

(*β*) for a principal not named.

(B) not known to be an agent (*b*).

2. Holding himself out as agent, but not having authority to bind his principal.

(A) where a principal is named

(*a*) who might be bound, but does not in fact authorize or ratify the contract

(*β*) who in law cannot be bound.

(B) where the alleged principal is not named.

(*a*) It is worth while to note that even if Equity had not refused to follow the law on this subject, the sort of restrictions in question might still be effectually created with little more trouble than at present. For instance when it was desired to impose such restrictions on a sale of land in lots, long leases at nominal rents might be substituted for conveyances in fee simple. The restrictive covenants would then run with the reversion at law by the Stat. of Hen. 8, and provision might be made for lessees enforcing them against one another in the name of the reversioner. On the other hand it is conceived that in the actual state of the law courts

of equity have by no means abandoned a discretion, which perhaps may yet be exercised with advantage, of refusing to enforce restrictive covenants when by lapse of time or change of circumstances they have become obsolete, vexatious, or useless. Cp. *Duke of Bedford v. Trustees of British Museum*, 2 M. & K. 552.

(*b*) Since the cases of *Calder v. Dobell*, *Fleet v. Murton*, and *Hutchinson v. Tatham* (see following notes) it may perhaps be considered that the true leading distinction is whether the agent is known to be an agent or not, rather than whether the principal is named or not.

1. In all cases where there is an agent dealing on behalf of a real principal, the intention of the parties determines whether the agent, or the principal, or both, are to be liable on the contract and entitled to enforce it. The question is to whom credit was really given (*a*). And the general rules laid down on the subject furnish only provisional answers, which may be displaced (subject to the rules as to admissibility of evidence) by proof of a contrary intention.

A. When the agent is known to be an agent, a contract is made, and knowingly made, by the other party with the principal, on which the principal is the proper person to sue and be sued.

And when the principal is named at the time, then there is *prima facie* no contract with the agent: but when the principal is not named, then *prima facie* the agent, though known to be an agent, does bind himself personally, since the other party is not presumed to give credit exclusively to an unknown principal (*b*).

But when the agent would not *prima facie* be a contracting party in person he may become so in various ways. Thus he is personally liable if he expressly undertakes to be so (*c*): such an undertaking may be inferred from the general construction of a contract in writing, and is always inferred when the agent contracts in his own name without qualification (*d*), though the principal is not the less also liable, whether named at the time or not (*e*), or

1. Agent for existing principal.

A. Known to be an agent: contract with principal *ab initio*.

a. Principal named: agent *prima facie* does not contract in person.

β. Principal not named: agent *prima facie* does contract in person.

Evidence of contrary intention (*a*.)

(*a*) Story on Agency, §§ 279, sqq. 288. *Thomson v. Davenport*, 2 Sm. L. C. 364, sqq.; *Calder v. Dobell*, L. R. 6 C. P. 486.

(*b*) But one who deals with an agent known to be such cannot set off against the principal's claim a debt due to him from the agent. If he has employed an agent on his own part, that agent's knowledge is for this purpose treated as the employer's own: and this even though the knowledge was not acquired in the course of the particular employment: *Dresser v. Norwood*, Ex. Ch., 17 C. B. N. S. 466, 34 L. J. C. P. 48, revg. *a. c.* 14 C. B. N. S. 574, 32 L. J. C. P. 201. The Indian Contract Act has followed the view of the C. P. in preference to that of the Ex. Ch. See *a.* 229. And per-

haps the question may deserve to be reconsidered if it ever comes before a court of last resort.

(*c*) Story on Agency, § 269. Smith, Merc. Law, 158.

(*d*) See *Fairlie v. Fenton*, L. R. 5 Ex. 169, *Paice v. Walker*, *ib.* 173. The latter case, however, goes too far; see note (*f*) next p.

(*e*) *Higgins v. Senior*, 8 M. & W. 834: the law there laid down goes to superadd the liability of the agent, not to take away that of the principal, *Calder v. Dobell*, L. R. 6 C. P. 486. As to when directors of companies are personally liable on documents signed by them, see Lindley, l. 364, and in addition to authorities there collected, *Dutton v. Marsh*, L. R. 6 Q. B. 361.

Technical
rule as to
deed of
agent.

if he himself has an interest in the subject-matter of the contract, as in the case of an auctioneer (*a*). And when the agent is dealing in goods for a merchant resident abroad, it is held on the ground of mercantile usage and convenience that without evidence of express authority to that effect the commission agent cannot pledge his foreign constituent's credit, and therefore contracts in person (*b*). When a deed is executed by an agent as such but purports to be the deed of the agent and not of the principal, then the principal cannot sue or be sued upon it at law, by reason of the technical rule that those persons only can sue or be sued upon an indenture who are named or described in it as parties (*c*). And it is also held in equity that a party who takes a deed under seal from an agent in the agent's own name elects to charge the agent alone (*d*). A similar rule has been supposed to exist as to negotiable instruments: but modern decisions seem to show that when an agent is in a position to accept bills so as to bind his principal, the principal is liable though the agent signs not in the principal's name but in his own, or, it would appear, in any other name. It is the same as if the principal had signed a wrong name with his own hand (*e*).

Evidence
of contrary
intention
(*β*).

Again, an agent who would otherwise be liable on the contract made by him may exempt himself from liability by contracting in such a form as makes it appear on the face of the contract that he is contracting as agent only and not for himself as principal (*f*): but even then he may be treated as a contracting party and personally bound as well as his principal by the

(*a*) 2 Sm. L. C. 399. As to an auctioneer's personal liability for non-delivery to a purchaser of goods bought at the auction, *Woolfe v. Horne*, 2 Q. B. D. 355.

(*b*) *Armstrong v. Stokes*, L. R. 7 Q. B. 598, 605. *Acc. Elbinger Actien-Gesellschaft v. Claye*, L. R. 8 Q. B. 313, showing that the foreign principal cannot sue on the contract: *Hutton v. Bulloch*, *ib.* 331, affirmed in Ex. Ch. 9 Q. B. 572, that he cannot be sued.

(*c*) *Lord Southampton v. Brown*, 6 B. & C. 718; *Beckham v. Drake*, 9 M. & W. at p. 95.

(*d*) *Pickering's claim*, 6 Ch. 525.

(*e*) *Lindus v. Bradwell*, 5 C. B. 583, 17 L. J. C. P. 123. *Cp. Ed-*

munds v. Bushell, L. R. 1 Q. B. 97.

(*f*) Words in the body of a document which amount to a personal contract by the agent are not deprived of their effect by a qualified signature: *Lennard v. Robinson*, 5 E. & B. 125, 24 L. J. Q. B. 275; and the description of him as agent in the body of the document may under special circumstances not be enough to make him safe, *Paice v. Walker*, L. R. 5 Ex. 173; see the remarks on that case in *Gadd v. Houghton* (C. A.) 1 Ex. D. 357, which decides that a contract "on account of" a named principal conclusively discharges the agent. *Paice v. Walker* is nearly but not quite overruled.

custom of the particular trade in which he is dealing (a). Or he may limit his liability by special stipulations, *e.g.* when a charter-party is executed by an agent for an unnamed freighter, and the agent's signature is unqualified, but the charter-party contains a clause providing that the agent's responsibility shall cease as soon as the cargo is shipped (b).

It is also a rule that an agent for a government is not personally a party to a contract made by him on behalf of such government by reason merely of having made the contract in his own name (c). In some cases the agent, though *prima facie* not a party to the contract as agent, can yet sue or be sued as principal on a contract which he has made as agent. These will be mentioned under another head of this subject (d).

Where an undertaking is given in general terms, no promise being named, to a person who obviously cannot be a principal in the matter, it may be inferred as a fact from the circumstances that some other person interested is the real unnamed principal, and such person may recover on the contract (e).

B. When a party contracts with an agent whom he does not know to be an agent, the undisclosed principal is generally bound by the contract and entitled to enforce it, as well as the agent with whom the contract is made in the first instance (f).

But the limitations of this rule are important. In the first place, it does not apply where an agent for an undisclosed principal contracts in such terms as import that he is the real and only principal. There the principal cannot afterwards sue on the contract (g). Much less, of course, could he do so if the nature of the contract itself (for instance, partnership) were inconsistent with a principal unknown at the time taking the

B. Agent not known to be an agent. Generally there is a contract with the undisclosed principal. Exceptions.

(a) *Humfrey v. Dale*, 7 E. & B. 266, E. B. & E. 1004, 26 L. J. Q. B. 137; *Fleet v. Murton*, L. R. 7 Q. B. 126, 129; *Hutchinson v. Tatham*, L. R. 8 C. P. 482. On the general question of the construction of contracts made by brokers for their principals see *Southwell v. Bowditch* (C. A.) 1 C. P. D. 374.

(b) *Oglesby v. Yglesias*, E. B. & E. 930, 27 L. J. Q. B. 356; *Carr v. Jackson*, 7 Ex. 382.

(c) *Macbeath v. Haldimand*, 1 T.

R. 172, cp. *ib.* 674; *Gidley v. Lord Palmerston*, 3 Bro. & Bing. 275; Story on Agency, § 302, sqq.

(d) *Infra*, pp. 234, 235.

(e) *Weidner v. Hoggett*, 1 C. P. D. 538.

(f) The rule is not excluded by the contract being in writing (not under seal) and signed by the agent in his own name: *Beckham v. Drake*, 9 M. & W. at p. 91.

(g) *Humble v. Hunter*, 12 Q. B. 310, 17 L. J. Q. B. 350.

place of the apparent contracting party. Likewise, "if the principal represents the agent as principal he is bound by that representation. So if he stands by and allows a third person innocently to treat with the agent as principal he cannot afterwards turn round and sue him in his own name" (a).

Limitations of the rule when it applies. As to rights of principal.

Again, in the cases to which the rule does apply, the rights of both the undisclosed principal and the other contracting party are qualified as follows:

The principal "must take the contract subject to all equities in the same way as if the agent were the sole principal" (b). Accordingly if the principal sues on the contract the other party may avail himself of any defence which would have been good against the agent (c): thus a purchaser of goods through a factor may set off a claim against the factor in an action by the factor's principal for the price of the goods (d). "Where a contract is made by an agent for an undisclosed principal, the principal may enforce performance of it, subject to this qualification, *that the person who deals with the agent shall be put in the same position as if he had been dealing with the real principal*, and consequently he is to have the same right of set-off which he would have had against the agent" (e). And his claim to be allowed such set-off is not effectually met by the reply that when he dealt with the agent he had the means of knowing that he was only an agent. The existence of means of knowledge is not material except as evidence of actual knowledge (f).

(a) *Ferrand v. Bischoffsheim*, 4 C. B. N. S. 710, 716, 27 L. J. C. P. 302.

(b) Story on Agency, § 420; per Parke, B. *Beckham v. Drake*, 9 M. & W. at p. 98.

(c) If the agent sues in his own name the other party cannot set off a debt due from the principal whom he has in the meantime discovered, there being no mutual debt within the statute of set-off: *Isberg v. Bowden*, 8 Ex. 852. Under the new practice, however, he can make the principal a party to the action by counter-claim and have the whole matter disposed of. See the Judicature Act, 1873, s. 24, sub-a 3, and the Rules of the Supreme Court, Order XIX., r. 3, and Order XXII.,

rr. 5-10.

(d) *Rabone v. Williams*, 7 T. R. 360, n.; *Sims v. Bond*, 5 B. & Ad. 393. Per Cur., *Isberg v. Bowden*, 8 Ex. at p. 859. It does not matter whether the factor is or is not actually authorized by his principal to sell in his own name without disclosing the agency: *Ex parte Dixon*, 4 Ch. D. 133.

(e) Per Willes, J. *Dresser v. Norwood*, 14 C. B. N. S. 574, 588, 32 L. J. C. P. 201, 205. The reversal of this case in the Ex. Ch. 17 C. B. N. S. 466, 34 L. J. C. P. 48, does not affect this statement of the general law.

(f) *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38.

And conversely the right of the other contracting party to hold the principal liable is subject to the qualification that the state of the account between the principal and the agent must not be altered to the prejudice of the principal. This doctrine, originally laid down in a dictum of Lord Tenterden (a), has been adhered to by a late decision of the Court of Queen's Bench, who held that the principal is not liable if he has in good faith paid the agent at a time when the other party still gave credit to the agent and knew of no one else (b). As to rights of the other party.

Again, the other party may choose to give credit to the agent exclusively after discovering the principal, and in that case he cannot afterwards hold the principal liable; and statements or conduct of the party which lead the principal to believe that the agent only will be held liable, and on the faith of which the principal acts, will have the same result (c). And though the party may elect to sue the principal, yet he must make such election within a reasonable time after discovering him (d). When it is said that he has a right of election, this means that he may sue either the principal or the agent, or may commence proceedings against both, but may only sue one of them to judgment; and a judgment obtained against one, though unsatisfied, is a bar to an action against the other. It was decided in *Priestly v. Fernie* (e) that such is the rule as to principal and agent in general, and that there is no exception in the case of shipowner and freighter, which was the case before the Court.

The mere commencement of proceedings against the agent or his estate after the principal is discovered, although it may possibly be evidence of an election to charge the agent only, does not amount to an election in point of law (f).

(a) *Thomson v. Davenport*, 2 Sm. L. C. at p. 371.

(b) *Armstrong v. Stokes*, L. R. 7 Q. B. 598, dissenting from the opinion (though perhaps not from the actual decision) of the judges of the Court of Exchequer in *Heald v. Kenworthy*, 10 Ex. 739.

(c) Story on Agency, §§ 279, 288, 291; *Horsfall v. Pauntleroy*, 10 B. & C. 755; but the principal

is not discharged unless he has actually dealt with the agent on the faith of the other party's conduct so as to change his position: *Wyatt v. Hertford*, 3 East 147.

(d) *Smethurst v. Mitchell*, 1 E. & E. 622, 28 L. J. Q. B. 241.

(e) 3 H. & C. 977, 983, 34 L. J. Ex. 173; cp. L. R. 6 C. P. 499.

(f) *Curtis v. Williamson*, L. R. 10 Q. B. 57.

2. Professed agent not having authority.

2. We have now to point out the results which follow when a man professes to make a contract as agent, but is in truth not an agent, that is, has no responsible principal.

We may put out of consideration all cases in which the professed agent is on the face of the contract personally bound as well as his pretended principal: for his own contract cannot be the less valid because the contract he professed at the same time to make for another has no effect. But when the contract is not by its form or otherwise such as would of itself make the professed agent a party to it, there are several distinctions to be observed.

A. Principal named.

A. First, let us take the cases where a principal is named. The other party *prima facie* enters into the contract on the faith of that principal's credit. But credit cannot be presumed to be given except to a party who is capable of being bound by the contract: hence it is material whether the alleged principal is one who might authorize or ratify the contract, but does not, or is one who could not possibly do so.

a. Who might be responsible.

a. The more frequent case is where the party named as principal is one who might be responsible.

It is now settled law that, subject to the qualifications which will appear, the pretended agent has not in that case either the rights or the liabilities of a principal on the contract.

Professed agent cannot sue on the contract. *Bickerton v. Burrell*.

First, as to his rights. In *Bickerton v. Burrell* (a) the plaintiff had signed a memorandum of purchase at an auction as agent for a named principal. Afterwards he sued in his own name to recover the deposit then paid from the auctioneer, and offered evidence that he was really a principal in the transaction. But he was non-suited at the trial, and this was upheld by the full Court. It was laid down (per Lord Ellenborough, C. J., Bayley, Abbott, and Holroyd, JJ., concurring) that "where a man assigns himself as agent to a person named, the law will not allow him to shift his position, declaring himself principal and the other a creature of straw . . . A man who has

(a) 5 M. & S. 383.

dealt with another as agent (a) is not at liberty to retract that character *without notice* and to turn round and sue in the character of principal. The plaintiff misled the defendant and was bound to undeceive him before bringing an action." This leaves it doubtful what would have been the precise effect of the plaintiff giving notice of his real position before suing: but the modern cases seem to show that it would only have put the defendant to his election to treat the contract as a subsisting contract between himself and the plaintiff or to repudiate it at once. Before we come to these it must be mentioned that there is a reported case in equity which appears to be directly opposed to *Bickerton v. Burrell*. This is *Fellowes v. Lord Gwydyr* (b). The facts were shortly these. Lord Gwydyr was entitled as Deputy Great Chamberlain to the decorations used in Westminster Hall at the coronation of George IV. He sold these to the plaintiff Fellowes, who re-sold them to the defendant Page at an advanced price, but professed to be selling as the agent of Lord Gwydyr, and signed the agreement for sale in that character. Fellowes, being unable to procure Lord Gwydyr's consent to his name being used in an action, sued Page in his own name in equity for a balance due on the agreement. It was argued for the defendant that he had been misled "as to a most important ingredient in the contract, as to the person, namely, with whom he had really contracted" (c). And moreover it is difficult, for other reasons mentioned in the argument (c), to see what equity the plaintiff had except on some notion that there must always be a remedy in equity when there appears to be none at law. However it was held by Sir John Leach, V.-C., and by Lord Lyndhurst on appeal, that Page could not resist the performance of the contract without showing that he had been actually prejudiced by having it concealed from him that Fellowes was the real principal. It is submitted that this decision is contrary to the principles laid down in *Bickerton v. Burrell* and the other cases to be presently cited; that there is no intelligible reason for any distinction between law and equity on a question of contract or no contract; and

*Contra in equity
Fellowes v.
Lord Gwydyr: acq.*

(a) *I.e.* for a named and responsible principal.

(b) 1 Sim. 63, 1 Russ. & M. 83.

(c) 1 Russ. & M. at p. 85, 88.

that consequently *Fellowes v. Lord Gwydyr* cannot now be regarded as law (a).

Rayner v.
Grote.

The doctrine under consideration was further defined in *Rayner v. Grote* (b). There the plaintiff sued to recover a balance due upon the sale by him to the defendants of a quantity of soda ash according to a bought note in this form:—
“I have this day bought from you the following goods *from J. & T. Johnson*—50 tons soda ash, . . . J. H. Rayner.”
It was proved that the plaintiff was the real owner of the goods, and 13 tons out of the 50 had been delivered to the defendants and accepted by them at a time when there was strong evidence to show that they knew the plaintiff to be the real principal. The law was stated as follows (c):—

“In many such cases [*viz.* where the contract is wholly unperformed] such as for instance the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then show himself to be the real principal and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule.”

But here part performance had been accepted by the defendants with full knowledge that the plaintiff was the real principal, and it was therefore considered that the plaintiff was entitled to recover.

Nor can
the pro-
fessed
agent be
sued on the
contract.
Implied
warranty
of autho-
rity.

Next, as to the pretended agent's liability. It was at one time thought that an agent for a named principal who turned out to have no authority might be sued as a principal on the contract (d). But it has been determined that he is not liable on the contract itself (e). He is liable however on an implied warranty of his authority to bind his principal. This was

(a) It may be that the decision was right on the facts, on the ground that Page continued to act under the contract after knowing the true state of things (as was said in argument for the plaintiff, 1 Russ. & M. 83), which would bring the case within *Rayner v. Grote*, 15 M. & W. 359; but this is not mentioned

in the judgments.

(b) 15 M. & W. 359.

(c) Per Cur. at p. 365; and see the remarks on *Bickerton v. Burrell*, *ad fin.*

(d) Cp. Pothier, Obl. § 75.

(e) *Lewis v. Nicholson*, 18 Q. B. 508, 21 L. J. Q. B. 311.

decided in *Collen v. Wright* (a), and has been followed in several later cases (b). The pretended agent is also generally liable to an action in tort (c). A somewhat similar doctrine of implied warranty has been acted on in the case of the contract to marry. A person who promises marriage also promises or warrants that he is legally capable of marrying, and is therefore not the less liable for a breach of promise though it may be questionable whether the actual promise to marry was not unlawful (d). However this warranty was treated as an integral part of the principal contract, and no special reference to it in pleading was even suggested.

β. The rules last stated are applicable only where the alleged principal was ascertained and existing at the time the contract was made, and might have been in fact principal.

Here the doctrine of ratification is important. When a principal is named or described, but is not capable of authorizing the contract so as to be bound by it at the time, there can be no binding ratification: for "ratification must be by an existing person on whose behalf a contract might have been made at the time" (e).

There fall under this head contracts entered into by professed agents on behalf of wholly fictitious persons, or uncertain persons or sets of persons with whom no contract can be made by the description given, persons in existence but incapable of contracting, and lastly (which is in practice the most important

β. Alleged principal who could not be responsible: professed agent treated as principal.

(a) 7 E. & B. 301, 26 L. J. Q. B. 147; in Ex. Ch. 8 E. & B. 647, 27 L. J. Q. B. 215.

(b) *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Cherry v. Colonial Bank of Australia*, L. R. 3 P. C. 24, 31. But the representation of the agent that he has authority must be a representation of matter of fact and not of law: *Beattie v. Lord Ebury*, L. R. 7 Ch. 777, 7 H. L. 102; *Weeks v. Propert*, L. R. 8 C. P. 427, 437. As to the measure of damages, *Simons v. Patchett*, 7 E. & B. 568, 26 L. J. Q. B. 195; *Spedding v. Nevell*, L. R. 4 C. P. 212; *Godwin v. Francis*, L. R. 5 C. P. 295.

(c) *Randell v. Trimen*, 18 C. B. 786, 25 L. J. C. P. 307.

(d) *Millward v. Littlewood*, 5 Ex. 775, 20 L. J. Ex. 2; and this seems to be the true ground of the earlier decisions of the Court of C. P. in *Wilde v. Harris*, 7 C. B. 999, 18 L. J. C. P. 297. Cp. chap. VI. below, *ad fin.*

(e) Per Willes, J. and Byles, J. *Kelner v. Baxter*, L. R. 2 C. P. 174, 185, *Scott v. Lord Ebury*, *ib.* 255, 267. When ratification is admitted the original contract is imputed by a fiction of law to the person ratifying; and the fiction is not allowed to be extended beyond the bounds of possibility. The rule may be somewhat artificial, but is well established.

case) proposed companies which have not yet acquired a legal existence (a). Now when a principal is named who might have authorized the contract, there is at the time of the contract a possibility of his being bound by subsequent ratification. But when the alleged principal could not have authorized the contract, then it is plain from the beginning that the contract can have no operation at all unless it binds the professed agent. It is construed accordingly *ut res magis valeat quam pereat*, and he is held to have contracted in person (b).

This principle has been carried so far that in a case where certain persons, churchwardens and overseers of a parish, covenanted "for themselves and for their successors, churchwardens and overseers of the parish," and there was an express proviso that the covenant should not bind the covenantors personally, but was intended to bind the churchwardens and overseers of the parish for the time being as such churchwardens, &c., but not otherwise, it was held that since the funds of the parish could not be bound by the instrument in the manner intended, the effect of the proviso was to make no one liable on the covenant at all, and therefore the proviso was repugnant and void, and the covenantors were personally liable (c).

Accordingly the proper course for the other contracting party is to sue the agent as principal on the contract itself, and he need not resort to the doctrine of implied warranty (d). And as the agent can be sued, so it is apprehended that, in the absence of fraud, he might sue on the contract in his own name.

When
professed
agent may

A slightly different case is where a man professes to contract as agent, but without naming his principal. He is then (as

(a) *Kelner v. Baxter*, L. R. 2 C. P. 174, and authorities there referred to: *Scott v. Lord Ebury*, *ib.* 255. Companies have in some cases been held in equity to be bound by the agreements of their promoters, but on grounds independent of contract. See Lindley, l. 412-417; p. 188 above.

(b) *Kelner v. Baxter*, at pp. 183, 185.

(c) *Furnival v. Coombes*, 5 M. & Gr. 786. But the doctrine of this case will certainly never be extended (see *Williams v. Hathaway*, 6 Ch.

D. 544); and it may be doubted whether it would apply at all to an instrument not under seal. It is clearly competent to the parties to such an instrument to make its operation as a contract conditional on any event they please: and in such a case as this why may they not agree that nobody shall be bound if the principal cannot be? In *Kelner v. Baxter* oral evidence was offered that such was the intention, but was rejected as contrary to the terms of the writing sued upon.

(d) *Kelner v. Baxter*, *supra*.

said above) *prima facie* personally liable in his character of agent. But even if the contract is so framed as to exclude that liability (and therefore any correlative right to sue), he is not precluded from showing that he himself is the principal and suing in that character. This was decided in *Schmaltz v. Avery* (a). The action was on a charter-party. The charter-party in terms stated that it was made by Schmaltz & Co. (the plaintiffs) as agents for the freighters: it then stated the terms of the contract, and concluded in these words: "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmaltz & Co. shall cease as soon as the cargo is shipped." This clause was not referred to in the declaration, nor was the character of the plaintiff as agent mentioned, but he was treated as principal in the contract. At the trial it was proved that the plaintiff was in point of fact the real freighter. Before the Court in banc the cases of *Bickerton v. Burrell* and *Rayner v. Grote* (see pp. 231-2 above) were relied on for the defence, but it was pointed out that in those cases the agent named a principal on the faith of whose personal credit the other party might have meant to contract. Here "the names of the supposed freighters not being inserted, no inducement to enter into the contract from the supposed solvency of the freighters [could] be surmised. . . The plaintiff might contract as agent for the freighter, whoever the freighter might turn out to be, and might still adopt that character of freighter himself if he chose." (In a later case in the Exchequer Chamber (b) there are some expressions not very consistent with this, but they were by no means necessary for the decision. Moreover *Schmaltz v. Avery* was not cited.) And conversely, a man who has contracted in this form may nevertheless be sued on the contract as his own undisclosed principal, if the other party can show that he is in truth the principal, but not otherwise (c). In the same manner it is open to one of several persons with whom a contract was nominally made to show that he alone was the real principal, and to sue alone upon the contract accordingly (d).

(a) 16 Q. B. 655 (the statement of the facts is taken from the judgment of the Court, p. 658); 20 L. J. Q. B. 228.

(b) *Sharman v. Brandt*, L. R. 6

Q. B. 720.

(c) *Carr v. Jackson*, 7 Ex. 382, 21 L. J. Ex. 137.

(d) *Spurr v. Cass*, L. R. 5 Q. B. 656.

Where authority determined by death of principal unknown to parties. In present state of authority, *semble*, no one liable on the contract.

There is yet another exceptional state of things which has given rise to some difficulty. This is when a person assumes to contract as agent under an authority which he once had, but which has been determined, unknown to him and to the other party, by the death of his principal. The authorities, so far as they have gone, decide that in such a case the principal's estate is not bound (*a*) and that the agent is not liable either in tort or on the contract itself (*b*). No case of this kind has been decided since the doctrine of implied warranty of authority was introduced : but the strong tendency of the case last referred to, as well as the reason of the thing, are against holding the agent liable in any way when he has had no means of knowing the determination of his authority. It certainly seems desirable that either a court of appeal or the legislature should provide for the contract being held to bind the principal's estate, conformably to the requirements of justice and to other systems of civilized law. This has been done for British India by the Contract Act, 1872, s. 208, illust. (c). See Kent, Comm. 2. 646, D. 46. 3. *de solut. et liber.* 32 ; Poth. Obl. § 81, Code Civ. art. 2008, 2009. The German Commercial Code (art. 54) even enacts in general terms that the agent's authority is not determined by the death of the principal.

Indian Contract Act.

The subject-matter of the foregoing discussion is dealt with generally by ss. 226–238 of the Indian Contract Act. The rules as to the parties to a contract made with an agent are given in s. 280.

“In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases :—

- (1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad ;
- (2) Where the agent does not disclose the name of his principal ;
- (3) Where the principal, though disclosed, cannot be sued.”

(a) *Blades v. Free*, 9 B. & C. 167.

(b) *Smout v. Ilbery*, 10 M. & W.

1. The principle of implied warranty was suggested in the argu-

ment, but the later form of action on such warranty had not then been thought of.

This is based upon English law, but does not exactly represent it, as it omits to provide any fixed rule for the treatment of contracts made by an agent in writing. To make it correspond with English decisions, at least since *Fleet v. Murton* (a) and *Hutchinson v. Tat ham* (b), we should have to replace sub-a. 2 by words to this effect—

“Where it does not appear on the face of the contract that the agent is contracting only as agent for a principal.”

APPENDIX B. (see p. 202, above.)

Early Authorities on Assignments of Choses in Action.

In Mich. 3 Hen. IV. 8, pl. 34, is a case where a grantee of an annuity from the king sued on it in his own name. No question seems to have been raised of his right to do so.

1. Cases where a direct assignment only is in question.

In Hil. 37 Hen. VI. 13, pl. 3 (already cited in the chapter on Consideration, p. 155 above), it appears that by the opinion of all the justices an assignment of debts was no consideration (*quid pro quo*) for a bond, forasmuch as no duty was thereby vested in the assignee : and the Court of Chancery acted on that opinion by decreeing the bond to be delivered up : thus it is clear that the notion of such an assignment being good in equity though not at law had not then arisen. It may be noted in passing that the case is otherwise interesting, as it shows pretty fully the relations then existing between the Court of Chancery and the Courts of Common Law.

In Hil. 21 Ed. IV. 84, pl. 38, the question was raised whether an annuity for life granted without naming assigns could be granted over ; and the dictum occurs that the right of action, whether on a bond or on a simple contract, cannot be granted over.

Mich. 39 Hen. VI. 26, pl. 36. If the king grant a duty due to him from another, the grantee shall have an action in his own name : “*et issint ne puit nul autre faire.*”

So Mich. 2 Hen. VII. 8, pl. 25. “*Le Roy poit granter*

(a) L. R. 7 Q. B. 129.

(b) L. R. 8 C. P. 482.

sa accion ou chose qui gist en accion ; et issint ne poit nul autre person."

In Roll Abr. Action sur Case, l. 20, pl. 12, this case is stated to have been decided in B.R., 42 Eliz., between Mowse and Edney, *per curiam*: A. is indebted to B. by bill (*i.e.*, the now obsolete form of bond called a single bill), and B. to C. B. assigns A.'s bill to C. Forbearance on C.'s part for a certain time is no consideration for a promise by A. to pay C. at the end of that time (*s. v. contra*, *ib.* 29, pl. 60): for notwithstanding the assignment of the bill, the property of the debt remains in the assignor.

In none of these cases is there a single word about maintenance or public policy. On the contrary, it appears to be assumed throughout that the impossibility of effectually assigning a chose in action is inherent by some unquestionable necessity in the legal nature of things. Finally, in *Termes de la Ley*, tit. *Chose in Action*, the rule is briefly and positively stated to this effect: Things in action which are certain the king may grant, and the grantee have an action for them in his own name: but a common person can make no grant of a thing in action, nor the king himself of such as are uncertain. No reason is given.

The exception in favour of the Crown may perhaps be derived from the universal succession accruing to the Crown on forfeitures. This would naturally include rights of action, and it is easy to understand how the practice of assigning over such rights might spring up without much examination of its congruity with the legal principles governing transactions between subjects.

Before the expulsion of the Jews under Edward I. they were treated as a kind of serfs of the Crown (*tayllables au Roy come les sooes serfs et a nul autre*: Statutes of Jewry, *temp. incert.*, dated by Prynne 3 Ed. 1), and the king accordingly claimed and exercised an arbitrary power of confiscating, releasing, assigning, or licensing them to assign, the debts due to them. See on this subject Y.B. 33 Ed. 1 (in Rolls series), pp. xli., 355, and Prynne's "Short Demurrer to the Jews," &c. (Lond. 1656, a violent polemic against their re-admission to England), *passim*.

2. Cases
where the
right of an

In Hil 9 Hen. VI. 64, pl. 17, Thomas Rothewel sues J. Power for maintaining W. H. in an action of detinue against

him, Rothewel, for "*un box ove charters et muniments.*" Defence, assignee to sue in the name of the assignor was in question. that W. H. had granted to Pewer a rent-charge, to which the muniments in question related, and had also granted to Pewer the box and the deeds, then being in the possession of Rothewel to the use of W. H., wherefore Pewer maintained W. H., as he well might. To this Paston, one of the judges, made a curious objection by way of dilemma. It was not averred that W. H. was the owner of the deeds, but only that Rothewel had them to his use; and so the property of them might have been in a stranger: "*et issint ceo fuit chose en accion et issint tout void*": the precise meaning of these words is not very clear, but the general drift is that, for anything that appeared, W. H. had no assignable interest whatever; and it looks as if the strong expression *tout void* was meant to take a higher ground, distinguishing between a transaction impeachable for maintenance and one wholly ineffectual from the beginning. But if W. H. was the true owner, Paston continued, then the whole property of the deeds, &c., passed to Pewer, who ought to have brought detinue in his own name (a). Babington, C. J., and Martyn, J., the other judges present, were of a contrary opinion, holding that any real interest in the matter made it lawful to maintain the suit. The attempt to assign a chose in action is here compared by the counsel for the plaintiff to the grant of a reversion without attornment; showing that the personal character of the relation was considered the ground of the rule in both cases.

In Mich. 34 Hen. VI. 30, pl. 15, Robert Horn sued Stephen Foster for maintaining the administrators of one Francis in an action against him, R. Horn: the circumstances being that Horn was indebted to Francis by bond, and Francis being indebted to Stephen in an equal sum assigned the debt and delivered the bond to him, authorizing him, if necessary, to sue on it in his (Francis') name, to which Horn agreed; and now Francis had died intestate, and Stephen was suing on the bond in the name of the administrators with their consent. And this being pleaded for the defendant, was held good. Prisot, in giving judgment,

(a) Another argument put by the plaintiff's counsel, though not very material, is too quaint to be passed over: Whatever interest Pewer might have had by the grant of the

rent and the deeds relating to it, yet he had none in the box, and therefore in respect of the box, at all events, there was unlawful maintenance on his part.

compared the case of the *cestui que use* of lands, whether originally or claiming by purchase through him to whose use the feoffment was originally made, taking part in any suit touching the lands. On this Fitzherbert remarks (*Mayntenauns*, 14) "*Nota icy que per ceo il semble que un duite puit estre assigne pour satisfaction.*" So it is said in Hil. 15 Hen. VII. 2, pl. 3, that if one is indebted to me, and deliver to me an obligation in satisfaction of the debt, wherein another is bound to him, I shall sue in my debtor's name, and pay my counsel and all things incident to the suit; and so may do he to whom the obligation was made, for each of us may lawfully interfere in the matter.

Brooke, Abr. 140 *b*, observes, referring to the last mentioned case: "*Et sic vide que chose in accion poet estre assigne oustre pur loyal cause, come iust det, mez nemy pur maintenance.*" This form of expression is worth noting, as showing that assignment of a chose in action meant to the writer nothing else than empowering the assignee to sue in the assignor's name. He was at no pains to explain that he did not mean to say the assignee could sue in his own name; for he did not think any one could suppose he meant to assert such a plainly impossible proposition.

This evidence seems sufficient to establish with reasonable certainty the statement in our text, and to convert what was a not improbable conjecture *a priori* into historical fact. The historical difficulty is one which extends to the whole of our law of contract, namely that of tracing any continuity of general principles in the interval between the purely Roman expositions of them in Bracton and Britton and their first appearance in a definitely English form.

CHAPTER VI.

UNLAWFUL AGREEMENTS.

ALL agreements which the law refuses to enforce may perhaps in some sense be called unlawful. All transactions which injuriously affect either the public good or the interests of private persons who have no voice in the matter, or are not fully and freely consenting parties, may perhaps in some sense be called fraudulent. Hence the terms fraud and illegality have acquired in common use such a latitude of meaning as to make convenient arrangement and accurate discussion almost impossible. Sometimes fraud is treated as a species of illegality; sometimes, on the other hand, we find illegality treated wholly or in great part as a species of fraud.

Meaning
of unlaw-
ful agree-
ments.

But we shall here speak of unlawful agreements only in a more limited sense, which is now to be explained. We have already seen that an agreement is not in any case enforceable by law without satisfying sundry conditions: as, being made between capable parties, being sufficiently certain, and the like. If it does satisfy these conditions, it is in general a contract which the law commands the parties to perform.

But there are many things which the law positively commands people not to do. The reasons for issuing such commands, the weight of the sanctions by which they are enforced, and the degree of their apparent necessity or expediency, are exceedingly various, but for the present purpose unimportant. A murder, the obstruction of a highway, and the sale of a loaf otherwise than by weight, are all on the same footing in so far as they are all forbidden acts. If the subject-matter of an agreement be such that the performance of it would either consist in doing a forbidden act or be so connected therewith as to be in substance

Subject-
matter or
perform-
ance a
thing posi-
tively for-
bidden, or
part of a
transac-
tion which
as a whole
is for-
bidden
(illegal).

part of the same transaction, the law cannot command the parties to perform that agreement. It will not always command them not to perform it, for there are many cases where the performance of the agreement is not in itself an offence, though the complete execution of the object of the agreement is : but at all events it will give no sort of assistance to such a transaction. Agreements of this kind are void as being *illegal* in the strict sense.

Not positively forbidden but *immoral*.

Again there are certain things which the law (*a*) does not forbid in the sense of attaching penalties to them, but which are violations of established rules of decency, morals, or good manners, and of whose mischievous nature in this respect the law so far takes notice that it will not recognize them as the ground of any legal rights. "A thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it" (*b*). Agreements whose subject-matter falls within this description are void as being *immoral*.

Not positively forbidden, but *against public policy*.

Further there are a good many transactions which cannot fairly be brought within either of the foregoing classes and yet cannot conveniently be admitted as the subject-matter of valid contracts, or can be so admitted only under unusual restrictions. It is doubtful whether these can be completely reduced to any general description, and how far judicial discretion may go in novel cases. They seem in the main, however, to fall into the following categories :

Matters governed by reasons outside the regular scope of municipal law, and touching the relations of the commonwealth to foreign states :

Matters touching the good government of the commonwealth and the administration of justice :

Matters affecting particular legal duties of individuals whose performance is of public importance :

Things lawful in themselves, but such that individual citizens could not without general inconvenience be allowed to set bounds to their freedom of action with regard to those things in the

(*a*) i.e. the common law. But *qu.* whether the common law could take notice of anything as immoral which would not constitute

an offence against either common or ecclesiastical law.

(*b*) *Bramwell, B. Cowan v. Milbourn*, L. R. 2 Ex. at p. 236.

same manner or to the same extent as they may with regard to other things (a).

Agreements falling within this third description are void as being *against Public Policy*.

We have then in the main three sorts of agreements which are unlawful and void, according as the matter or purpose of them is—

A. Contrary to positive law. (*Illegal.*)

B. Contrary to positive morality recognized as such by law. (*Immoral.*)

C. Contrary to the common weal as tending

(a) To the prejudice of the State in external relations.

(b) To the prejudice of the State in internal relations.

(c) To improper or excessive interference with the lawful actions of individual citizens. (*Against public policy.*)

The distinction here made is in the reasons which determine the law to hold the agreement void, not in the nature or operation of the law itself: the nullity of the agreement itself is in every case a matter of positive law. Caution as to use of terms.

When we speak for shortness of the agreement itself as contrary to positive law, to positive morality, or to public policy, as the case may be, we must bear in mind that this is an inexact and merely symbolic mode of speech.

The arrangement here given is believed to be on the whole the most convenient, and to represent distinctions which are in fact recognized in the decisions which constitute the law on the subject. But like all classifications it is of course only approximate: and here more especially, where there is perhaps a wider field for judicial discretion than in any other part of the law, one must expect to find many cases which may nearly or quite as well be assigned to one place as to another. The authorities and dicta are too numerous to admit of any detailed review. Nor indeed would this be very desirable if it were possible. We have not to deal with such a state of things as in a foregoing chapter made it necessary to examine with some The arrangement only approximate.

(a) We have already seen that the specific operation of contract is none other than to set bounds to the

party's freedom of action as regards the subject-matter of the contract.

minuteness the leading decisions on the extent of corporate powers. Here the general rules are (with some few exceptions on certain topics) sufficiently well settled, so far as the nature of the case admits of general rules existing. Any given decision, on the other hand, is likely to be rather suggestive than conclusive when applied to a new set of facts. Some positive rules for the construction of statutes have been worked out by a regular series of decisions. But with this exception we find that the case-law on most of the branches of the subject presents itself as a clustered group of analogies rather than a linear chain of authority. We have then to select from these groups a certain number of the more striking and as it were central instances. The statement of the general rules which apply to all classes of unlawful agreements indifferently will be reserved, so far as practicable, until we have gone through the several classes in the order above given.

Classes of
Unlawful-
Agree-
ments.

A. Con-
trary to
positive
law.

1. Agree-
ment to
commit of-
fence,
void.

Sometimes
doubtful if
perform-
ance of
agreement
would be
offence.
*Mayor of
Norwich v.
Norfolk
Ry. Co.*

A. *Agreements contrary to positive law.*

1. The simplest case is an agreement to commit a crime or indictable offence :

“If one bind himself to kill a man, burn a house, maintain a suit, or the like, it is void ” (a).

With one or two exceptions on which it is needless to dwell, obviously criminal agreements do not occur in our own time and in civilized countries, and at all events no attempt is made to enforce them. It is said that in the last century a bill was filed in Chancery by a highwayman against his fellow for a partnership account, but the story is at least doubtful (b). The question may arise, however, whether a particular thing agreed to be done is or is not an offence, or whether a particular agreement is or is not on the true construction of it an agreement to commit an offence. In the singular case of *Mayor of Norwich v. Norfolk Ry. Co.* (c), the defendant company, being authorized to make a bridge over a navigable river at one particular place, had found difficulties in executing the statutory plan, and had begun to build the bridge at another place. The plaintiff corporation took steps to indict the company for a nuisance. The

(a) Shepp. Touchst. 370.

(b) See Lindley, 1. 188.

(c) 4 E. & B. 397, 24 L. J. Q. B. 105.

matter was compromised by an arrangement that the company should—not discontinue their works, but—complete them in a particular manner intended to make sure that no serious obstruction to the navigation should ensue: and an agreement was made by deed, in which the company covenanted to pay the corporation £1000 if the works should not be completed within twelve months, whether an Act of Parliament should within that time be obtained to authorize them or not. The corporation sued on this covenant, and the company set up the defence that the works were a public nuisance and therefore the covenant to complete them was illegal. The Court of Queen's Bench was divided on the construction and effect of the deed. Erle, J. thought it need not mean that the defendants were to go on with the works if they did not obtain the Act. "Where a contract is capable of two constructions, the one making it valid and the other void, it is clear law the first ought to be adopted." Here it should be taken that the works contracted for were works to be rendered lawful by Act of Parliament. Coleridge, J. to the same effect: he thought the real object was to secure by a penalty the speedy reduction of a nuisance to a nominal amount, which was quite lawful, the corporation not being bound to prosecute for a nominal nuisance. Lord Campbell, C. J. and Wightman, J. held the agreement bad, as being in fact an agreement to continue an existing unlawful state of things. The performance of it (without a new Act of Parliament) would have been an indictable offence, and the Court could not presume that an Act would have been obtained. Lord Campbell said, "In principle I do not see how the present case is to be distinguished from an action by A. against B. to recover £1000, B. having covenanted with A. that within twelve calendar months he would murder C., and that on failing to do so he would forfeit and pay to A. £1000 as liquidated damages, the declaration alleging that although B. did not murder C. within the twelve calendar months he had not paid A. the £1000" (a). The question was also discussed whether the covenant was *ultra vires* or not on the part of the company. But of this we have spoken in a former chapter.

It seems impossible to draw any conclusion in point of law

(a) 4 E. & B. 441.

from such a division of opinion (*a*). But the case gives this practical warning, that whenever it is desired to contract for the doing of something which is not certainly lawful at the time, or the lawfulness of which depends on some event not within the control of the parties, the terms of the contract should make it clear that the thing is not to be done unless it becomes or is ascertained to be lawful.

When the ulterior object is an offence. Moreover a contract may be illegal because an offence is contemplated as its ulterior result. For example, there is nothing unlawful in printing, but no right of action can arise for work done in printing a criminal libel (*b*). But this depends on the more general considerations which we reserve for the present.

2. Agreement for civil wrong to third persons is void. 2. Again an agreement will generally be illegal, though the matter of it may not be an indictable offence, and though the formation of it may not amount to the offence of conspiracy, if it contemplates any civil injury to third persons. Thus an agreement to divide the profits of a fraudulent scheme, or to carry out some object in itself not unlawful by means of a trespass, breach of contract, or breach of trust is unlawful and void. It is submitted that this must be taken as established, notwithstanding a doubt expressed in a work of no small authority. The cases cited in support of the proposition "that a contract is not illegal or void simply because private rights are interfered with by the act stipulated for" do not seem by any means to bear it out (*c*): and there is direct authority the

(*a*) Not only was the Court equally divided, but a perusal of the judgments at large will show that no two members of it really looked at the case in the same way. The reporters (4 E. & B. 397) add not without reason to the head-note: *Et quære inde*.

(*b*) *Poplett v. Stockdale*, 1 R. & M. 337.

(*c*) Notes to *Collins v. Blantern*, 1 Sm. L. C. 398. An agreement to commit a civil injury is a conspiracy in many, but it seems impossible to say precisely in what cases. See the title of Conspiracy (by Sir James Stephen) in the last edition of *Roscoe's Digest*. An agreement to commit a trespass likely to lead

to a breach of the peace, *Reg. v. Rowlands*, 17 Q. B. 671, 686, 21 L. J. M. C. 81—or to commit a civil wrong by fraud and false pretences, *Reg. v. Warburton*, L. R. 1 C. C. R. 274, cp. *Reg. v. Aspinall*, 2 Q. B. D. at p. 59—is a conspiracy. An agreement to commit a simple breach of contract is not a conspiracy. Before the C. L. P. Act a court of common law could not take notice of an agreement being in breach of trust so as to hold it illegal: *Warwick v. Richardson*, 10 M. & W. 284, and agreements to indemnify trustees against formal breaches of trust are in practice constantly assumed to be valid in equity as well as at law.

other way. A. applies to his friend B. to advance him the price of certain goods which he wants to buy of C. B. treats with C. for the sale, and pays a sum agreed upon between them as the price. It is secretly agreed between A. and C. that A. shall pay a further sum : this last agreement is void as a fraud upon B., whose intention was to relieve A. from paying any part of the price (a). Again, A. and B. are interested in common with other persons in a transaction the nature of which requires good faith on all hands, and a secret agreement is made between A. and B. to the prejudice of those others' interest. Such are in fact the cases of agreements "in fraud of creditors" : that is, where there is an arrangement between a debtor and the general body of the creditors, but in order to procure the consent of some particular creditor, or for some other reason, the debtor or any person on his behalf secretly promises that creditor some advantage over the rest. All such secret agreements are void, securities given in pursuance of them may be set aside, and money paid under them ordered to be repaid (b). Moreover the other creditors who know nothing of the fraud and enter into the arrangement on the assumption "that they are contracting on terms of equality as to each and all" are under such circumstances not bound by any release they give (c). And it will not do to say that the underhand bargain was in fact for the benefit of the creditors generally, as where the preferred creditor becomes surety for the payment of the composition, and the real consideration for this is the debtor's promise to pay his own debt in full ; for the creditors ought to have the means of exercising their own judgment (d). But where one creditor is induced to become surety for an instalment of the composition by an agreement of the principal debtor to indemnify him, and a pledge of part of the assets for that purpose, this is valid ; for a compounding debtor is master of the assets and may apply them as he will (e).

Agreement in fraud of creditors is void.

And other creditors not bound by the composition.

The principle of these rules was thus explained by Erle, J. in *Mallalieu v. Hodgson* :—(f)

(a) *Jackson v. Duckaire*, 3 T. R. 551.

(b) *McKewan v. Sanderson*, 15 Eq. at p. 234, per Malins V.-C. See *Leake* 403-5.

(c) *Daughish v. Tennent*, L. R. 2 Q. B. 49, 54.

(d) *Wood v. Barker*, 1 Eq. 139.

(e) *Ex parte Burrell*, (C.A.) 1 Ch. D. 537.

(f) 16 Q. B. 689, 20 L. J. Q. B. 339, 347. See further *Ex parte Oliver*, 4 De G. and Sm. 354.

"Each creditor consents to lose part of his debt in consideration that the others do the same, and each creditor may be considered to stipulate with the others for a release from them to the debtor in consideration of the release by him. Where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void—not only can he take no advantage from it, but he is also to lose the benefit of the composition (a). The requirement of good faith among the creditors and the preventing of gain by agreements for preference have been uniformly maintained by a series of cases from *Leicester v. Rose* (b) to *Howden v. Haigh* (a) and *Bradshaw v. Bradshaw*" (c).

From the last cited case (c) it seems probable, though it is not decided, that when a creditor is induced to join in a composition by having an additional payment from a stranger without the knowledge of either the other creditors or the debtor, the debtor on discovering this may refuse to pay him more than with such extra payment will make up his proper share under the composition, or may even recover back the excess if he has paid it involuntarily, *e. g.* to *bona fide* holders of bills given to the creditor under the composition.

A debtor who has given a fraudulent preference can claim no benefit under the composition even as against the creditor to whom the preference has been given (d).

A secret agreement by a creditor to withdraw his opposition to a bankrupt's discharge or to a composition is equally void; and it does not matter whether it is made with the debtor himself or with a stranger (d), nor whether the consideration offered to the creditor for such withdrawal is to come out of the debtor's assets or not (e); and this even if it is part of the agreement that the creditor shall not prove against the estate at all (f). In like manner if a debtor executes an assignment of his estate and effects for the benefit of all his creditors upon a secret agreement with the trustees that part of the assets is to be returned to him, this agreement is void (g).

(a) *Howden v. Haigh*, 11 A. & E. 1033.

(b) 4 East 372: showing that the advantage given to the preferred creditor need not be in money.

(c) 9 M. & W. 29.

(d) *Higgins v. Pitt*, 4 Ex. 312.

(e) *Hall v. Dyson*, 17 Q. B. 785, 21 L. J. Q. B. 224.

(f) *McKewan v. Sanderson*, 20 Eq. 65.

(g) *Blacklock v. Dobie*, 1 C. P. D. 265.

We have here at an early stage of the subject a good instance of the necessarily approximate character of our classification. We have placed these agreements in fraud of creditors here as being in effect agreements to commit civil injuries. But a composition with creditors is in most cases something more than an ordinary civil contract ; it is in truth a quasi-judicial proceeding, and as such is recognized and assisted by the law (a). Public policy, therefore, as well as private right requires that such a proceeding should be conducted with good faith and that no transaction which interferes with equal justice being done therein should be allowed to stand. The doctrine of fraud on third parties, as it may be called, is however not to be extended to cases of mere suspicion or conjecture. A possibility that the performance of a contract may injure third persons is no ground for presuming that such was the intention, and on the strength of that presumed intention holding it invalid between the parties themselves.

Fraud on third parties not to be presumed from mere possibilities.

“ Where an instrument between two parties has been entered into for a purpose which may be considered fraudulent as against some third person, it may yet be binding, according to the true construction of its language, as between themselves.”

Nor can a supposed fraudulent intention as to third persons (inferred from the general character and circumstances of a transaction) be allowed to determine what the true construction is (b).

3. There are certain cases analogous enough to the foregoing to call for mention here, though not for any full treatment. Their general type is this : There is a contract giving rise to a continuing relation to which certain duties are incident by law ; and a special sanction is provided for those duties by holding that transactions inconsistent with them avoid the original contract, or are themselves voidable at the option of the party whose rights are infringed. We have results of this kind from

3. Certain cases of analogous nature as involving “ fraud on third persons.”

(a). Dealings between a principal debtor and creditor to the prejudice of a surety :

(β). Dealings by an agent in the business of the agency on his own account :

(a) Bankruptcy Act 1869, s. 126. 432, 455.
 (b) *Shaw v. Jeffery*, 13 Moo. P. C.

(γ). Voluntary settlements before marriage "in fraud of marital rights."

In the first case the improper transaction is as a rule valid in itself, but avoids the contract of suretyship. In the second it is voidable as between the principal and the agent. In the third it is voidable at the suit of the husband.

Dealings
between
principal
creditor
and debtor
to preju-
dice of
surety.

α. "Any variance made without the surety's consent in the terms of the contract between the principal debtor and the creditor discharges the surety as to transactions subsequent to the variance" (a), if either the original contract was made part of the surety's contract, or the variance is material, that is, such as to put the surety in a worse position (which last is a question of law, not of fact) (b). The surety is not the less discharged "even though the original agreement may notwithstanding such variance be substantially performed" (c). An important application of this rule is that "where there is a bond of suretyship for an officer, and by the act of the parties or by Act of Parliament the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided" (d). But when the guaranty is for the performance of several and distinct duties, and there is a change in one of them, or if an addition is made to the duties of the principal debtor by a distinct contract, the surety remains liable as to those which are unaltered (e). The following rules rest on the same ground :

"The surety is discharged by any contract between the creditor and the principal debtor by which the principal debtor is released, or by any act or omission of the creditor the legal consequence of which is the discharge of the principal debtor" (f).

"A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to

(a) Indian Contract Act, s. 133.

(b) *Sanderson v. Aston*, L. R. 8 Ex. 78.

(c) Per Lord Cottenham, *Bonar v. Macdonald*, 3 H. L. C. 226, 238.

(d) *Oswald v. Mayor of Berwick-on-Tweed*, 5 H. L. C. 856 ; *Pybus v. Gibb*, 6 E. & B. 902, 911, 26 L. J. Q. B. 41 ; *Mayor of Cambridge v.*

Dennis, E. B. & E. 660, 27 L. J. Q. B. 474.

(e) *Harrison v. Seymour*, L. R. 1 C. P. 518 ; *Skillett v. Fletcher*, L. R. 1 C. P. 217, 224, in Ex. Ch. 2 C. P. 469.

(f) I. C. A. s. 134. *Kearsley v. Cole*, 16 M. & W. 128 ; *Cragoe v. Jones*, L. R. 8 Ex. 81.

give time to or not to sue the principal debtor, discharges the surety, unless the surety assents to such contract" (a), or unless in such contract the creditor reserves his rights against the surety (b), in which case the surety's right to be indemnified by the principal debtor continues (c). One reported case constitutes an apparent exception to the general rule, but is really none, as there the nominal giving of time had in substance the effect of accelerating the creditor's remedy (d).

"If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged" (e).

"A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses or without the consent of the surety parts with such security, the surety is discharged to the extent of the value of the security" (f). Not only an absolute parting with the security, but any dealing with it such that the surety cannot have the benefit of it in the same condition in which it existed in the creditor's hands, will have this effect (g).

β. "If an agent deals on his own account in the business of Dealings the agency without first obtaining the consent of his principal by agent in and acquainting him with all material circumstances which have of the matter of the

(a) I. C. A. s. 135. *Oakeley v. Pasheller*, 4 Cl. & F. 207; *Oriental Financial Corporation v. Overend, Gurney & Co.* L. R. 7 H. L. 318; *Green v. Wynn*, 4 Ch. 204; *Bateson v. Gosling*, L. R. 7 C. P. 9.

(b) Whether the surety knows of it or not: *Webb v. Hewitt*, 4 K. & J. 488, 442; and see per Lord Hatherley, 7 Ch. 150.

(c) *Close v. Close*, 4 D. M. G. 176, 185. The reasonableness of the rule is open to question, but it is firmly established. See per Cur. in *Swire v. Redman*, 1 Q. B. D. 541-2.

(d) *Hulme v. Coles*, 2 Sim. 12.

(e) I. C. A. s. 139 (=Story, Eq.

Jur. § 325 nearly); *Watson v. Allcock*, 4 D. M. G. 242, *supra*, p. 160; *Burgess v. Eoe*, 18 Eq. 450; *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Sanderson v. Aston*, L. R. 8 Ex. 73.

(f) I. C. A. s. 141. *Mayhew v. Crickett*, 2 Swanst. 185, 191; *Wulff v. Jay*, L. R. 7 Q. B. 756, 762; *Becherraise v. Lewis*, L. R. 7 C. P. 377; securities now subsist notwithstanding payment of the debt for the benefit of a surety who has paid, Merc. Law Amendment Act 1856, 19 & 20 Vict. c. 97, s. 5. And see 2 Wh. & T. L. C. (4th ed.) 1002.

(g) *Pledge v. Buss*, Johns. 603.

agency on
his own
account.

come to his own knowledge on the subject, the principal may repudiate the transaction" (a): the Indian Act goes on to add, "if the case show either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him," but these qualifications are not recognized in English law (b).

"If an agent without the knowledge of his principal deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction" (c).

These rules are well known and established and have been over and over again asserted in the most general terms. The commonest case is that of an agent for sale himself becoming the purchaser, or conversely: "He who undertakes to act for another in any matter shall not in the same matter act for himself. Therefore a trustee for sale shall not gain any advantage by being himself the person to buy." "An agent to sell shall not convert himself into a purchaser unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed" (d). "It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper" (e). If the local usage of a particular trade or market countervenes this axiom by "converting a broker employed to buy into a principal selling for himself," it cannot be treated as a custom so as to bind a principal dealing in that trade or market through a broker, but himself ignorant of the usage (f).

The rule is not arbitrary or technical, but rests on the principle

(a) I. C. A. s. 215.

(b) See Story on Agency § 210 ; *Ex parte Lacey*, 6 Ves. 626.

(c) I. C. A. s. 216.

(d) *Whichcote v. Lawrence*, 3 Ves. 750 ; *Lowther v. Lowther*, 13 Ves. 95, 108 ; and see *Charter v. Trevelyan*, 11 Cl. & F. 714, 732.

(e) Per Willes, J. in *Mollett v. Robinson*. L. R. 5 C. P. at p. 655. Cp. *Guest v. Smythe*, 5 Ch. 551, per Giff-

fard, L. J. ; *Sharman v. Brandt*, L. R. 6 Q. B. 720.

(f) *Robinson v. Mollett*, L. R. 7 H. L. 802, 838. For the special application of the rule to the duty of directors of companies, *Hay's* ca. 10 Ch. 598, *Albion Steel Wire Co. v. Martin*, 1 Ch. D. at p. 585, per Jessel, M. R. ; as to promoters, *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73.

that an agent cannot be allowed to put himself in a position in which his interest and his duty are in conflict, and the Court will not consider "whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that." It is a corollary from the main rule that so long as a contract for sale made by an agent remains executory he cannot re-purchase the property from his own purchaser except for the benefit of his principal (a). A like rule applies to the case of an executor purchasing any part of the assets for himself. But it is put in this somewhat more stringent form, that the burden of proof is on the executor to show that the transaction is a fair one. This brings it very near to the doctrine of Undue Influence, of which in a later chapter. It makes no difference that the legatee from whom the purchase was made was also co-executor (b). Another branch of the same principle is to be found in the rules against trustees and limited owners renewing leases or purchasing reversions for themselves (c).

Again "It may be laid down as a general principle that in all cases where a person is either actually or constructively an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employers" (d). "If a person makes any profit by being employed contrary to his trust, the employer has a right to call back that profit" (e). And it is not enough for an agent who is himself interested in the matter of the agency to tell his principal that he has some interest: he must give full information of all material facts (f).

Even this is not all: an agent, or at any rate a professional

(a) *Parker v. McKenna*, 10 Ch. 96, 118, 124, 125. And see on the subject generally the notes to *Fox v. Mackreth* in 1 Wh. & T. L. C.

(b) *Gray v. Warner*, 16 Eq. 577.

(c) Notes to *Keech v. Sandford* in 1 Wh. & T. L. C. The last case on the subject is *Trumper v. Trumper*, 14 Eq. 295, 8 Ch. 870. On the general rule see also *Marsh v. Whitmore*, (Sup. Court, U. S.) 21 Wall.

178.

(d) Story on Agency § 211, adopted by the Court in *Morison v. Thompson*, L. R. 9 Q. B. 480, 485, where several cases are collected.

(e) *Massey v. Davies*, 7 Ves. 817, 320.

(f) See authorities collected, and observations of the Court thereon, *Dunne v. English*, 18 Eq. 524, 534.

adviser, cannot keep any benefit which may happen to result to him from his own ignorance or negligence in executing his duty. In such a case he is considered a trustee for the persons who would be entitled to the benefit if he had done his duty properly (a).

Nature of remedies applicable.

In this class of cases the rule seems to be that the transaction improperly entered into by the agent is voidable so far as the nature of the case admits. Where it cannot be avoided as against third parties, the principal can recover the profit from the agent. But where there are a principal, an agent, and a third party contracting with the principal and cognizant of the agent's employment, and there are dealings between the third party and the agent which give the agent an interest against his duty, there the principal on discovering this has the option of rescinding the contract altogether. Thus when company A. contracted to make a telegraph cable for company B., and a term of the contract was that the work should be approved by C., the engineer of company B., and C. took an undisclosed sub-contract from company A. for doing the same work; and further it appeared that this arrangement was contemplated when the contract was entered into; it was held that company B. might rescind the contract (b).

Settlements in fraud of marital right.

γ. The rule as to settlements "in fraud of marital right" was thus given by Lord Langdale (c):—

"If a woman entitled to property enters into a treaty for marriage and during the treaty represents to her intended husband that she is so entitled, that upon her marriage he will become entitled *jure mariti*, and if during the same treaty she clandestinely conveys away the property in such manner as to defeat his marital right and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt but that a fraud is thus practised on the husband and he is entitled to relief" (d).

But it does not stop here. "If both the property and the mode of its conveyance, pending the marriage treaty, were concealed from the intended husband as in the case of *Goddard v. Snow* (e), there

(a) *Bulkley v. Wilford*, 2 Cl. & F. 102. Cp. *Corley v. Lord Stafford*, 1 De. G. & J. 238.

(b) *Panama & S. Pacific Telegraph Co. v. India Rubber &c. Co.* 10 Ch. 515.

(c) Cp. on this subject Dav. Conv. vol. 3, pt. 2. 707.

(d) *England v. Downs*, 2 Beav. 522, 528.

(e) 1 Russ. 485. See the earlier authorities there discussed.

is still a fraud practised on the husband. The non-acquisition of property of which he had no notice is no disappointment, but still his legal right to property actually existing is defeated" (a).

In order to have such a settlement set aside the husband must prove—

Conditions
for setting
them aside.

(i) That he was the intended husband at the date of the settlement—i.e. that there was then a complete contract to marry which continued until the marriage (b).

(ii) That the settlement was not known to him till after the marriage (c).

What if the intended husband knows that some disposition has been or is to be made, but not its contents? The doctrine as far as it has gone seems to be that such knowledge makes it the duty of the husband to inform himself, and if he omits inquiry he cannot afterwards complain (d); but if he does inquire, and incorrect information is given, this is equivalent to total concealment (e). According to the modern doctrine no difference is made by collateral circumstances, "such as the poverty of the husband—the fact that he has made no settlement upon the wife—the reasonable character of the settlement [which is impeached], as in the case of a settlement upon the children of a former marriage" or the like.

Nevertheless relief may be refused on the ground that the husband's conduct before the marriage has been such as to "put it out of the power of the wife effectually to make any stipulation for the settlement of her property": as where there has been previous seduction (f).

The husband's right to set aside the settlement, like all rights of setting aside or rescinding voidable transactions, may be lost by acquiescence or delay amounting to proof of acquiescence (g).

(a) 2 Beav. 529.

(b) *England v. Downs*, *supra*. Cp. *Downes v. Jennings*, 32 Beav. 290, 294.

(c) *St. George v. Wake*, 1 My. & K. 610, 625.

(d) *Wrigley v. Swainson*, 3 De G. & Sm. 458.

(e) *Prideaux v. Lonsdale*, 4 Giff. 159. The Court of Appeal (1 D. J. S. 433, 438) declined to say anything on this part of the case, affirming the

decision on the ground that the settlor herself did not understand the effect of her act.

(f) *Taylor v. Pugh*, 1 Ha. 608, 614-6. In *Downes v. Jennings*, 32 Beav. 290, no importance was attached to the parties having lived together before marriage. But the circumstances were such as to show that their conduct was deliberate.

(g) *Loader v. Clarke*, 2 Mac. & G. 382.

Semble,
the prin-
ciple is
wider.

Other
transac-
tions
treated as
"fraud
upon mar-
riage con-
tract."

It is said that if the husband discovers the settlement before the marriage takes place, he may rescind the contract to marry, and will have a good defence to an action at law for breach of promise of marriage (*a*). This seems only reasonable, but we do not know of any direct authority for it. Finally we venture to suggest that the doctrine might well be put on a broader ground than appears in the cases. The contract to marry gives rise to a new status between the parties, to which mutual duties are incident beyond the simple performance of the contract by marriage at the time expressed or contemplated (*b*). Among these may fairly be reckoned the observance of the utmost good faith in all things, and in particular the duty of not making without the other party's consent any disposition of property of such a permanent and considerable kind as might affect the order and condition of the future household. Such conduct, one may think, shows a want of confidence which the other party is entitled to treat as incompatible with the marriage contract. Looking at it in this way, there seems no reason why the rule should not apply to both parties equally. The expectation of acquiring a marital right cannot be said really to exist in most cases. There is in truth a mutual expectation of acquiring what is practically a common interest. It is obvious, however, that as a rule the only motive for a clandestine settlement is the woman's desire to exclude the marital right of the future husband. Since no such motive can exist on the other side, the converse case of a clandestine settlement by the man is most unlikely to happen; there is little chance, therefore, that the correctness of the view here suggested will ever be brought to a decisive test. One reported case, however, supplies some analogy. By a marriage settlement the husband's father settled a jointure on the wife: by a secret bond of even date the husband indemnified his father against the payment of it: this indemnity was held void as "a fraud upon the faith of the marriage contract" (*c*).

4. Mar-
riage with-
in pro-

4. Marriages within the prohibited degrees of kindred and affinity are another class of transactions contrary to positive law.

(*a*) By Sir John Leach, M. R. in *St. George v. Wake*, *supra*.

(*b*) *Frost v. Knight*, L. R. 7 Ex. 111, 115, 118.

(*c*) *Palmer v. Neave*, 11 Ves. 165.

Cp. the other similar cases cited in Story Eq. Jur. §§ 266-271. One or two of these, however, are really cases of estoppel.

For although no direct temporal penalties are attached to them, they have been made the subject of express and definite statutory prohibition (a). They formerly could not be treated as void unless declared so by an Ecclesiastical Court in the lifetime of the parties: but by a modern statute (5 & 6 Wm. 4, c. 54) they are now absolutely void for all purposes. An executory contract to marry within the prohibited degrees is of course absolutely void also (b), and would indeed have been so before the statute. These rules are not local, like other rules of municipal law prescribing the solemnities of the marriage ceremony, requiring the consent of particular persons, or the like: the legislature has referred the prohibition to public grounds of a general nature (speaking of these marriages as "contrary to God's law") (c) and it concerns not the form but the substance of the contract; it therefore applies to the marriages of domiciled British subjects, in whatever part of the world the ceremony be performed, and whether the particular marriage is or is not of a kind allowed by the local law (d).

"If a marriage is absolutely prohibited in any country as being contrary to public policy and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering another state in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state to insist on their marriage being recognized as lawful" (e).

Where a marriage has been contracted in England between foreigners domiciled abroad, English Courts will recognize dis-

(a) 32 H. 8, c. 38, and earlier repealed statutes of the same reign. It is the better supported opinion that 5 & 6 Wm. 4, c. 54 does not contain any new substantive prohibition. See *Brook v. Brook*, 9 H. L. C. 193.

(b) It seems from *Millward v. Littlewood*, 5 Ex. 775, 20 L. J. Ex. 2, that in the barely possible case of the relationship being known to only one of the parties, by whom it is fraudulently concealed from the other, the innocent party may sue as for a breach of contract, though the performance of the agreement would be unlawful.

(c) The use of these particular words seems of little importance. The true reason is shortly put by Savigny, Syst. 8. 326: "die hier einschlagenden Gesetze, die auf sittlichen Rücksichten beruhen, haben eine streng positive Natur."

(d) *Brook v. Brook*, *supra*. And by Lord Campbell, *qu.* whether a marriage allowed by the law of the place, but contracted by English subjects who had come there on purpose to evade the English law, would be recognized even by the local courts.

(e) Per Lord Campbell, *Brook v. Brook*, 9 H. L. C. at p. 220.

abilities, though not being *juris gentium*, imposed by the law of the domicile (a).

Royal
Marriage
Act.

The "Act for the better regulating the future marriages of the Royal Family" (12 Geo. 3, c. 11) imposes on the persons within its operation disabilities (absolute before the age of 25, qualified after that age) to marry without the consent of the Sovereign: and this disability is personal, not local, so that a marriage without consent is equally invalid wherever celebrated (b).

5. Agree-
ments
illegal by
statute.

5. Moreover a great variety of dealings of which contracts form part, or to which they are incident in the ordinary course of affairs, are for extremely various reasons forbidden or restricted by statute. During the last century, in particular, Acts of Parliament regulating the conduct of sundry trades and occupations were strangely multiplied. Most of these are now repealed, but the decisions upon them established principles on which our Courts still act in dealing with statutes of this kind.

Construc-
tion of pro-
hibitory
statutes.

The question whether a particular transaction comes within the meaning of a prohibitory statute is manifestly one of construction. So far as we have to do with it here, we have in each case to ask, Does the Act mean to forbid this agreement or not? And in each case the language of the particular Act must be considered on its own footing. Decisions on the same Act may of course afford direct authority. But decisions on more or less similar enactments, and even on previous enactments on the same subject, cannot as a rule be regarded as giving more than analogies. Attempts have indeed been made at different times to lay down fixed rules, nominally of construction, but really amounting to rules of law which would control rather than ascertain the expressed intention of the legislature. But in recent times our courts have fully and explicitly disclaimed any such powers of interpretation.

"The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament

(a) *Sottomayor v. De Barros*, in C. A. Nov. 26, 1877, revg. a. c. 2 P. D. 81. (b) *The Sussex Peerage case*, 11 Cl. & F. 85.

which passed the Act ;" provided that the words be "sufficient to accomplish the manifest purpose of the Act" (a).

In like manner it is now understood that one or two dicta which are to be found in the books, suggesting that an Act of Parliament against "common right" or "natural equity" would be void, must stand as warning rather than authority (b). The effect of plain and unambiguous words is not to be limited by judicial construction even though anomalous results should follow (c).

On the other hand the general intention is to be regarded, and may if necessary prevail over particular expressions, no less than in the interpretation of private instruments (d). But this must be an intention collected from what the legislature has said, not arrived at by conjectures of what the legislature might or ought to have meant. A transaction not in itself immoral is not to be held unlawful on a conjectural view of the policy of a statute (e). We may now understand the meaning of this last phrase, which is not uncommon in cases of the kind now before us. The true policy of a statute, in a court of justice at all events, is neither more nor less than its right and reasonable construction. The Courts no longer undertake either to cut short or to widen the effect of legislation according to their views of what ought to be the law.

The cases in which acts of corporate bodies created for special purposes have been held void as "contrary to the policy of the legislature" and tending to defeat the objects of the incorporation have already been considered in Ch. II. Rightly understood, they are quite consistent, it is believed, with what is here said.

These principles, when applied to the more limited subject-matter of prohibitory statutes, give the following corollaries :

(a) Opinion of the Judges in the *Sussex Peerage* ca. 11 Cl. & F. at p. 143, per Tindal, C. J. ; per Lord Brougham at p. 150. And see per Knight Bruce, L. J. *Crofts v. Middleton*, 8 D. M. G. 217 ; per Lord Blackburn, in *River Wear Commrs. v. Adamson*, 2 App. Ca. at p. 764.

(b) Per Willes, J. *Lee v. Bude, &c., Ry. Co.* L. R. 6 C. P. 576, 582. Cp.

dictum of Lord Holt, cited 12 Beav. 68 : "An act of parliament can do no wrong, though it may do several things that look pretty odd."

(c) *Cargo ex Argos, &c.* L. R. 5 P. C. at pp. 152-3.

(d) As to which see L. R. 2 Ex. 198.

(e) *Barton v. Muir*, L. R. 6 P. C. 134.

Rules.

(A). When a transaction is forbidden, the grounds of the prohibition are immaterial. Courts of justice cannot take note of any difference between *mala prohibita* (*i. e.* things which if not forbidden by positive law would not be immoral) and *mala in se* (*i. e.* things which are so forbidden as being immoral).

A. No difference between *malum prohibitum* and *malum in se*.
B. Penalty *prima facie* imports prohibition.

(B). The imposition of a penalty by the legislature on any specific act or omission is *prima facie* equivalent to an express prohibition.

These rules are established by the case of *Bensley v. Bignold* (*a*), which decided that a printer could not recover for his work or materials when he had omitted to print his name on the work printed, as then required by statute (*b*). It was argued that the contract was good, as the act contained no specific prohibition, but only a direction sanctioned by a penalty. But the Court held unanimously that this was untenable, and a party could not be permitted to sue on a contract where the whole subject-matter was "in direct violation of the provisions of an Act of Parliament." And Best, J. said that the distinction between *mala prohibita* and *mala in se* was long since exploded. The same doctrine has repeatedly been enounced in later cases.

Thus, for example, by the Court of Exchequer :

"When the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute though the statute inflicts a penalty only, because such a penalty implies a prohibition" (*c*).

It is needless to discuss the "policy of the law" when it is distinctly enunciated by a statutory prohibition (*d*).

c. But absence of penalty does not alter express prohibition.

(c). Conversely, the absence of a penalty, or the failure of a penal clause in the particular instance, will not prevent the Court from giving effect to a substantive prohibition (*e*).

(a) 5 B. & Ald. 385.

(b) See now 32 & 33 Vict. c. 24.

(c) *Cope v. Rowlands*, 2 M. & W. 149, 157. Cp. *Chambers v. Manchester & Milford Ry. Co.* 5 B. & S. 588, 33 L. J. C. P. 268, *Re Cork &*

Youghal Ry. Co. 4 Ch. 748, 758.

(d) See per Lord Cranworth, *Ex parte Neilson*, 3 D. M. G. 556, 566.

(e) *Sussex Peerage ca.* 11 Cl. & F. at pp. 148-9.

(D). What the law forbids to be done directly cannot be made lawful by being done indirectly. D. What may not be done directly must not be done indirectly.

In *Booth v. Bank of England* (a) a joint stock bank procured its manager to accept certain bills on the understanding that the bank would find funds, these bills being such as the bank itself could not have accepted without violating the privileges of the Bank of England. It was held by the House of Lords, following the opinion of the judges, that this proceeding "must equally be a violation of the rights and privileges of the Bank of England, upon the principle that whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance:" for the acceptor was merely nominal, and the bills were in fact meant to circulate on the credit of the bank. Booth v. Bank of England.

In *Bank of United States v. Owens* (b) (Supreme Court, U.S.) the charter of the bank forbade the taking of a greater rate of interest than six per cent., but did not say that a contract should be void in which such interest was taken. A note payable in gold was discounted by a branch of the bank in a depreciated local paper currency at its nominal value, so that the real discount was much more than six per cent. The Court held this transaction void, though there was no express prohibition of an *agreement* to take higher interest, and though the charter spoke only of *taking*, not of *reserving* interest. Parts of the judgment are as follows: "A fraud upon a statute is a violation of the statute." "It cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. In those instances in which Courts are called upon to inflict a penalty it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offence. But when the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule that it is unlawful to contract to do that which it is unlawful to do." Bank of U. S. v. Owens.

"There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal . . . there is no distinction as to vitiating the contract between *malum in se* and *malum prohibitum*" (c).

(a) 7 Cl. & F. 509, 540, upholding *Bank of England v. Anderson*, 2 Keen 328, 3 Bing. N. C. 589.

(b) 2 Peters 527.

(c) 2 Peters 536, 539.

The cases are similar in principle in which transactions have been held void as attempts to evade the bankruptcy laws: thus, to take only one example, a stipulation that a security shall be increased in the event of the debtor's bankruptcy or any provision which has the same effect, is void (a).

Where conditions prescribed for conduct of particular trade &c. non-observance of them—
E. avoids agreements if the conditions are for general public purposes;
F. not if for merely administrative purposes.
Illustrations.

When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession—

(E) are void if it appears by the context that the object of the legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed:

(F) are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, *e.g.* the convenient collection of the revenue (b).

The following are instances illustrating this distinction:—

AGREEMENT VOID.

Ritchie v. Smith, 6 C. B. 462, 18 L. J. C. P. 9. The owner of a licensed house underlet part of it to another person, in order that he might there deal in liquor on his own account under colour of his lessor's licence and without obtaining a separate licence. This agreement was void, its purpose being to enable one of the parties to infringe an Act passed for the protection of public morals: (the licensing Acts are of this nature, and not merely for the benefit of the revenue, for this reason, that licences are not to be had as a matter of right by merely paying for them.) For the same reason and also because there is a specific penalty for each offence against the licensing law, it seems that a sale of liquor in an unlicensed house is void (c). *Hamilton v. Grainger*, 5 H. & N. 40.

Taylor v. Crowland Gas Co. 10 Ex. 293, 23 L. J. Ex. 254. A penalty being imposed by statute on unqualified persons acting as conveyancers (d), the Court held that the object was not merely the

(a) *Ex parte Mackay*, 3 Ch. 643; *Ex parte Williams*, (C.A.) 7 Ch. D. 138, where the device used was the attornment of the debtor to his mortgagee at an excessive rent.

(b) This statement differs only verbally from Mr. Benjamin's. (On

Sale, p. 432.) We have tried to put it in a rather more general form.

(c) For the penal enactments now in force see the Licensing Act, 1872, 35 & 36 Vict. c. 94, ss. 8-8.

(d) Now by 33 & 34 Vict. c. 97, s. 60.

gain to the revenue from the duties on certificates, but the protection of the public from unqualified practitioners; an unqualified person was therefore not allowed to recover for work of this nature. (*1*). *Leman v. Houseley*, L. R. 10 Q. B. 66.

Fergusson v. Norman, 5 Bing. N. C. 76. When a pawnbroker lent money without complying with the requirements of the statute, the loan was void and he had no lien on the pledge (*a*).

In *Stevens v. Gourley*, 7 C. B. N. S. 99, 29 L. J. C. P. 1, a builder was not allowed to recover the price of putting up a wooden shed contrary to the regulations imposed by the Metropolitan Building Act, 18 & 19 Vict. c. 122. The only question in the case was whether the structure was a *building* within the Act. But note that here the prohibition was for a public purpose, namely to guard against the risk of fire.

Burton v. Piggott, L. R. 10 Q. B. 86. By 5 & 6 Wm. 4, c. 50, s. 46, a penalty is imposed on any surveyor of highways who shall have an interest in any contract, or sell materials, &c. for work on any highway under his care, unless he first obtain a licence from two justices. The effect of this is that an unlicensed contract by a surveyor to perform work or supply materials for any highway under his care is absolutely illegal, and the justices have no discretion (under s. 44) to allow payments in respect of it.

CONTRACT NOT AVOIDED.

Bailey v. Harris, 12 Q. B. 905, 18 L. J. Q. B. 115. A contract of sale is not void merely because the goods are liable to seizure and forfeiture to the Crown under the excise laws.

Smith v. Marshood, 14 M. & W. 452. The sale of an exciseable article is not avoided by the seller having omitted to paint up his name on the licensed premises as required by 6 Geo. 4, c. 81, s. 25. Probably this decision would govern the construction of the very similar enactment in the Licensing Act, 1872 (35 & 36 Vict. c. 94, s. 11).

Smith v. Lindo, 4 C. B. N. S. 395, in Ex. Ch. 5 C. B. N. S. 587. One who acts as a broker in the City of London without being licensed under 6 Ann. c. 68 (Rev. Stat. : al. 16) and 57 Geo. 3, c. lx. (*b*) cannot recover any commission, but a purchase of shares made by him in the market is not void: and if he has to pay the purchase

(*a*) The present Pawnbrokers Act (1872; 35 & 36 Vict. c. 98, s. 51) enacts that an offence against the Act by a pawnbroker, not being an offence against any provision relating to licences, shall not avoid the contract or deprive him of his lien.

(*b*) These acts are repealed as to the power of the city court to make rules, &c., but not as to the necessity of brokers being admitted, by the somewhat obscurely framed London Brokers Relief Act, 1870, 33 & 34 Vict. c. 60.

money by the usage of the market, he can recover from his principal the money so paid.

And see further, as to statutory prohibitions of this kind, Benjamin on Sale 427-433.

And in general an agreement which the law forbids to be made is void if made. But an agreement forbidden by statute may be saved from being void by the statute itself, and on the other hand an agreement made void or not enforceable by statute is not necessarily illegal. An agreement may be forbidden without being void, or void without being forbidden.

g. Agree-
ment not
void
though for-
bidden, if
statute ex-
pressly so
provides.

(g). Where a statute forbids an agreement, but says that if made it shall not be void, then if made it is a contract which the Court must enforce.

By 1 & 2 Vict. c. 106, it is unlawful for a spiritual person to engage in trade, and the ecclesiastical court may inflict penalties for it. But by s. 31 a contract is not to be void by reason only of being entered into by a spiritual person contrary to the Act. It was contended without success in *Lewis v. Bright* (a) that this proviso could not apply when the other party knew with whom he was dealing. But the Court held that the knowledge of the other party was immaterial; the legislature meant to provide against the scandal of such a defence being set up. And Erle, J. said that one main purpose of the law was to make people perform their contracts, and in this case it fortunately could be carried out.

h. Agree-
ment may
be simply
not en-
forceable,
but not
otherwise
unlawful.

(h). Where no penalty is imposed, and the intention of the legislature appears to be simply that the agreement is not to be enforced, there neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose.

Modern legislation has produced some very curious results of this kind: In several cases the agreement cannot even be called void, being good and recognizable by the law for some purposes or for every purpose other than that of creating a right of action. These cases are reserved for a special chapter (b).

(a) 4 E. & B. 917, 24 L. J. Q. B. 191.

(b) See ch. XII., On Agreements of Imperfect Obligation. The distinction between an enactment which imposes a penalty without making the transaction void, and one which makes the forbidden transaction void, is expressed in the civil law by the terms (which are

classical) *minus quam perfecta lex* and *perfecta lex*. (See Sav. Syst. 4. 550.) A constitution of Theodosius and Valentinian (Cod. 1. 14. *de leg.* 5) enjoined that all prohibitory enactments were to be construed as avoiding the transactions prohibited by them (that is, as *leges perfectae*) whether it were so expressed or not.

In the case of wagers the agreement is null and void by 8 & 9 Vict. c. 109, s. 18, and money won upon a wager cannot be recovered either from the loser or from a stakeholder (with a saving as to subscriptions or contributions for prizes or money to be awarded "to the winner of any lawful game, sport, pastime, or exercise ;" the saving extends only to cases where there is a real competition between two or more persons (a), and the "subscription or contribution" is not money deposited with a stakeholder by way of wager) (b). Wagers were not as such unlawful or unenforceable at common law (we shall have to recur to this under the head of "public policy"): and since the statute does not create any offence or impose any penalty, a man may still without violating any law make a wager, and if he loses it pay the money or give a note for the amount. The consideration for a note so given is in point of law not an illegal consideration, but merely no consideration at all. The difference is important to the subsequent holder of such a note. If the transaction between the original parties were fraudulent or in the proper sense illegal, the burden of proof would be on the holder to show that he was in fact a holder for value; but here the ordinary presumption in favour of the holder of a negotiable instrument is not excluded (c). In like manner "if a party loses a wager and requests another to pay it for him, he is liable to the party so paying it for money paid at his request:" as where a broker is employed in fictitious dealings in shares which are really wagers on the price of shares, and according to custom himself pays the amount due (d). This goes farther than an earlier case in which it was held, in a somewhat guarded manner, that payment by the drawer of racing debts of the acceptor is a good consideration for a bill of exchange (e).

But under another modern statute (5 & 6 Wm. 4, c. 41, s. 1) securities for money won at *gaming* or betting on games are treated as given for an illegal consideration.

(a) *e.g.* a wager that a horse will trot eighteen miles in an hour is not within it, as there can be no winner in the true sense of the clause: *Batson v. Newman*, (C. A.) 1 C. P. D. 578.

(b) *Diggle v. Higgs*, (C. A.) 2 Ex. D. 422.

(c) *Fitch v. Jones*, 5 E. & B. 238,

24 L. J. Q. B. 293, see judgments of Lord Campbell, C. J. and Erle, J.

(d) *Rosewarne v. Billing*, 15 C. B. N. S. 816, 33 L. J. C. P. 55.

(e) *Oulds v. Harrison*, 10 Ex. 572, 577. As to recovering money deposited with a stakeholder, see p. 330 below.

Wagers.
Void but
not abso-
lutely
illegal.
Fitch v.
Jones.

It would be inappropriate to the general purpose of this work, as well as impracticable within its limits, to enter in detail upon the contents or construction of the statutes which prohibit or affect various kinds of contracts by regulating particular professions and occupations or otherwise. It has been attempted, however, to make some collection of them in an appendix to this chapter. The writer does not suppose the catalogue to be complete, neither does he profess to have studied or even verified every one of the enactments referred to. On the contrary he has made free use of the index to the Revised Statutes, and has deemed himself entitled to assume its correctness.

Agreements in derogation of private Acts of Parliament not necessarily bad.

The rules and principles of law which disallow agreements whose object is to contravene or evade an Act of Parliament do not apply to private Acts, so far as these are in the nature of agreements between parties. If any of the persons interested make arrangements between themselves to waive or vary provisions in a private Act relating only to their own interests, it cannot be objected to such an agreement that it is in derogation of, or an attempt to repeal the Act (a).

B. Contrary to positive morality.

B. *Agreements contrary to morals or good manners.*

Practically this means only sexual morality.

It is not every kind of immoral object or intention that will vitiate an agreement in a court of justice. When we call a thing immoral in a legal sense we do not mean so much that it is ethically wrong as that according to the common understanding of reasonable men it would be a scandal for a court of justice to treat it as lawful or indifferent, though the transaction may not come within any positive prohibition or penalty. What sort of things fall within this description is in a general way obvious enough. And the law might well stand substantially as it is, according to modern decisions at any rate, upon this ground alone. Some complication has been introduced, however, by the influence of ecclesiastical law, which on certain points has been very marked, and which has certainly brought in a tendency to treat these cases in a peculiar manner, to mix up the principles of ordinary social morality with considerations of a different

Influence of ecclesiastical law.

(a) *Sarin v. Hoylake Ry. Co.* L. claim, 10 Ch. 177.
R. 1 Ex. 9. Cp. and dist. *Shaw's*

kind, and with the help of those considerations to push them sometimes to extreme conclusions. Having regard to the large powers formerly exercised by spiritual courts in the control of opinions and conduct, and technically still subsisting, it seems certain that everything which our civil courts recognize as immoral is an offence against ecclesiastical law. Perhaps, indeed, the converse proposition is theoretically true, so far as the ecclesiastical law is not directly contrary to the common law (a). But this last question may be left aside as merely curious.

As a matter of fact sexual immorality, which formerly was and in theory still is one of the chief subjects of ecclesiastical jurisdiction, is the only or almost the only kind of immorality of which the common law takes notice as such. Probably drunkenness would be on the same footing. It is conceived, for example, that a sale of intoxicating liquor to a man who then and there avowed his intention of making himself or others drunk with it would be void at common law. The actual cases of sale of goods and the like for immoral purposes, on whose analogy this hypothetical one is put, depend on the principles applicable to unlawful transactions in general, and are accordingly reserved for the last part of this chapter. Putting apart for the present these cases of indirectly immoral agreements, as they may be called, we find that agreements are held directly immoral in the limited sense above mentioned, on one of two grounds: as providing for or tending to illicit cohabitation, or as tending to disturb or prejudice the status of lawful marriage ("in derogation of the marriage contract" as it is sometimes expressed).

With regard to the first class, the main principle is this. The promise or expectation of future illicit cohabitation is an unlawful consideration, and an agreement founded on it is void. Past cohabitation is not an unlawful consideration; indeed there may in some circumstances be a moral obligation on the man to provide for the woman; but the general rule applies (b) that a past executed consideration, whether such as to give rise

Illicit cohabitation
—if future,
an illegal
consideration: if
past, no
consideration.

(a) Cp. Lord Westbury's remarks in *Hunt v. Hunt*, 4 D. F. J. at pp. 226-8, 238.

(b) But the rule is modern (Ch. IV, p. 157 above), and the earlier cases on this subject belong to a time when a

different doctrine prevailed; they therefore discuss matters which in the modern view are simply irrelevant, e.g. the previous character of the parties. The phrase *præmium pudicitiae* comes from this period.

to a moral duty or not, is equivalent in law to no consideration at all. An agreement made on no other consideration than past cohabitation is merely voluntary, and is in the same plight as any other voluntary agreement. If under seal it is binding and can be enforced (a), otherwise not (b). The existence of an express agreement to discontinue the illicit cohabitation, which in law is merely superfluous and adds nothing at all—or the fact of the defendant having previously seduced the plaintiff, which “adds nothing but an executed consideration resting on moral grounds only,”—can make no difference in this respect (b).

Judgment
of Lord
Selborne,
Ayerst v.
Jenkins.

The manner in which these principles are applied was thus stated in a recent case by Lord Selborne:—

“Most of the older authorities on the subject of contracts founded on immoral consideration are collected in the note to *Benyon v. Nettlefold* (c). Their results may be thus stated: 1. Bonds or covenants founded on past cohabitation, whether adulterous (d), incestuous, or simply immoral, are valid in law and not 'liable (unless there are other elements in the case) to be set aside in equity. 2. Such bonds or covenants, if given in consideration of future cohabitation, are void in law (e), and therefore of course also void in equity. 3. Relief cannot be given against any such bonds or covenants in equity if the illegal consideration appears on the face of the instrument (f). 4. If an illegal consideration does not appear on the face of the instrument the objection of *particeps criminis* will not prevail against a bill of discovery in equity in aid of the defence to an action at law (g), [this is now of little or no consequence in England, owing to the changes in procedure]. 5. Under some (but not under all) circumstances when the consideration is unlawful, and does not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity” (h).

The exception alluded to in the last sentence is probably this: that “where a party to the illegal or immoral purpose comes himself to be relieved from the obligation he has contracted in respect of it,

(a) *Gray v. Mathias*, 5 Ves. 286.

(b) *Beaumont v. Reeve*, 8 Q. B. 483.

(c) 3 Mac. & G. 94, 100.

(d) *Kaye v. Moore*, 1 Sim. & St. 61.

(e) *Walker v. Perkins*, 3 Burr. 1568.

(f) *Gray v. Mathias*, 5 Ves. 286; *Smyth v. Griffin*, 13 Sim. 245, appears

to be really nothing else than an instance of the same rule. The rule is or was a general one: *Simpson v. Lord Howden*, 3 My. & Cr. 97, 102.

(g) *Benyon v. Nettlefold*, *supra*.

(h) *Ayerst v. Jenkins*, 16 Eq. 275, 282.

he must state distinctly and exclusively such grounds of relief as the Court can legally attend to" (a). He must not put his case on the ground of an immoral consideration having in fact failed, or complain that the instrument does not correctly express the terms of an immoral agreement (b).

Where a security is given on account of past cohabitation, and the illicit connexion is afterwards resumed, or even is never broken off, the Court will not presume from that fact alone that the real consideration was future as well as past cohabitation, nor therefore treat the deed as invalid (c).

There existed a notion that in some cases the legal personal representative of a party to an immoral agreement might have it set aside, though no relief would have been given to the party himself in his lifetime: but this has been lately pronounced "erroneous and contrary to law" (d). It must be borne in mind that the whole doctrine applies to executory agreements only. An actual transfer of property, which is on the face of it "a completed voluntary gift, valid and irrevocable in law" and confers an absolute beneficial interest, cannot be afterwards impeached either by the settlor or by his representatives, though in fact made on an immoral consideration (e).

Where parties who have been living together in illicit cohabitation separate, and the man covenants to pay an annuity to the woman, with a proviso that the annuity shall cease or the deed shall be void if the parties live together again, there the covenant is valid as a simple voluntary covenant to pay an annuity, but the proviso is wholly void. It makes no difference, of course, if the parties, being within the prohibited degrees of affinity, have gone through the form of marriage, and the deed is in the ordinary form of a separation deed between husband and wife (f). When the parties are really married such a proviso is usual but superfluous, for the deed is in any case avoided by the parties afterwards living together (g). This brings us to the second

Proviso for
reconciliation
in
quasi separation
deed
is void.

(a) *Batty v. Chester*, 5 Beav. 103, 109.

(b) *Seemle*, relief will not be given if it appears that the immoral consideration has been executed: *Simey v. Eley*, 17 Sim. 1: but the case is hardly intelligible.

(c) *Gray v. Mathias*, 5 Ves. 286; *Hall v. Palmer*, 3 Ha. 582.

(d) *Ayerst v. Jenkins*, 16 Eq. 275, 281, 284.

(e) *Ex parte Naden*, 9 Ch. 670.

(f) *Westmeath v. Westmeath*, 1 Dow. & Cl. 519.

branch of this topic, namely the validity of separation deeds and agreements for separation.

Separation
deeds in
general.
Hunt v.
Hunt.

Both the history of the subject and the present state of the law will be found very clearly set forth in Lord Westbury's judgment in *Hunt v. Hunt* (a). From the ecclesiastical point of view marriage was a sacrament creating an indissoluble relation. The duties attaching to that relation were "of the highest possible religious obligation" and paramount to the will of the parties. In ecclesiastical courts an agreement or provision for a voluntary separation present or future was simply an agreement to commit a continuing breach of duties with which no secular authority could meddle, and therefore was illegal and void.

For a long while all causes touching marriage even collaterally were claimed as within the exclusive jurisdiction of those courts. The sweeping character and the gradual decay of such claims have already been illustrated by cases we have had occasion to cite from the Year Books in other places. In later times the ecclesiastical view of marriage was still upheld, so far as the remaining ecclesiastical jurisdiction could uphold it (b), and continued to have much influence on the opinions of civil courts; the amount of that influence is indeed somewhat understated in Lord Westbury's exposition. But the common law, when once its jurisdiction in such matters was settled, never adopted the ecclesiastical theory to the full extent. A contract providing for and fixing the terms of an immediate separation is treated like any other legal contract. It must satisfy the ordinary condition of being made between competent parties, and the wife cannot contract with her husband: but even this difficulty is in certain exceptional cases not insuperable (p. 62 above) and it is generally circumvented by the contract being made between the husband and a trustee for the wife. Being good and enforceable at law, the contract is also good and enforceable in equity, nor is there any reason for refusing to enforce it by any of the peculiar remedies of equity. In *Hunt v. Hunt* the husband was restrained from suing in the Divorce Court for restitution of conjugal rights in violation of his covenant in a

(a) 4 D. F. J. 221. The case was taken to the House of Lords, but the proceedings came to an end

without any decision by the death of the wife. See 1 Sm. L. C. 391.

(b) See 4 D. F. J. 235-8.

separation deed (a), on the authority of the decision of the House of Lords (b) which had already established that the Court may order specific performance of an agreement to execute a separation deed containing such a covenant. The case may be taken as having finally put the law on a consistent and intelligible footing, though not without overruling a great number of pretty strong dicta of various judges in the Court of Chancery and even in the House of Lords (c). But an agreement by the wife not to oppose proceedings for a divorce pending at the suit of the husband is void, being not only in derogation of the marriage contract, but a collusive agreement to evade the due administration of justice (d).

Wilson v. Wilson.

We have seen that when it is sought to obtain the specific performance of a contract the question of consideration is always material, even if the instrument is under seal. Generally it is part of the arrangement in these cases that the trustees shall indemnify the husband against the wife's debts, and this is an ample consideration for a promise on the husband's part to make provision for the wife, and of course also for his undertaking to let her live apart from him, enjoy her property separately, &c. (e). But this particular consideration is by no means necessary. The trustee's undertaking to pay part of the costs of the agreement will do as well. But if the agreement is to execute a separation deed containing all usual and proper clauses, this includes, it seems, the usual covenant for indemnifying the husband, so that the usual consideration is in fact present (f). In the earlier cases, no doubt, it was supposed that the contract was made valid in substance as well as in form only by the distinct covenants between the husband and the trustee as to indemnity and payment, or rather that these were the only valid parts of the contract. But

Consideration for agreements for separation deeds.

(a) This covenant could not be pleaded in the Divorce Court, which held itself bound by the former ecclesiastical practice to take no notice of separation deeds.

(b) *Wilson v. Wilson*, 1 H. L. C. 538.

(c) In *St. John v. St. John*, 11 Ves. 535, &c., *Westmeath v. Westmeath*, 1 Jac. 142 (Lord Eldon); *Worrall v. Jacob*, 3 Mer. 268 (Sir W. Grant); *Warrender v. Warrender*, 2 Cl. & F.

527 (Lord Brougham), 561-2 (Lord Lyndhurst). Most of these are to be found cited in the argument in *Wilson v. Wilson*. And even since that case *Vansittart v. Vansittart*, 2 De G. & J. 255 (Lord Chelmsford).

(d) *Hope v. Hope*, 8 D. M. G. 731, 745.

(e) See *Dav. Conv.* 5, pt. 2, 1079.

(f) *Gibbs v. Harding*, 5 Ch. 386.

Minor
points as to
separation
deeds.

since *Wilson v. Wilson* (a) and *Hunt v. Hunt* such a view is no longer tenable: in Lord Westbury's words "the theory of a deed of separation is that it is a contract between the husband and wife through the intervention of a third party, namely the trustees, and the husband's contract for the benefit of the wife is supported by the contract of the trustees on her behalf" (b). A covenant not to sue for restitution of conjugal rights cannot be implied, and in the absence of such a covenant the institution of such a suit does not discharge the other party's obligations under the separation deed (c). Subsequent adultery does not of itself avoid a separation deed unless the other party's covenants are expressly qualified to that effect (d). A covenant by the husband to pay an annuity to trustees for the wife so long as they shall live apart remains in force notwithstanding a subsequent dissolution of the marriage on the ground of the wife's adultery (e). But the concealment of past misconduct between the marriage and the separation may render the arrangement voidable, and so may subsequent misconduct, if the circumstances show that the separation was fraudulently procured with the present intention of obtaining greater facilities for such misconduct (f).

A separation, or the terms of a separation, between husband and wife cannot lawfully be the subject of an agreement for pecuniary consideration between the husband and a third person. But in the case of *Jones v. Waite* (g) it was decided by the Exchequer Chamber and the House of Lords that the husband's execution of a separation deed already drawn up in pursuance of an existing agreement is a good and lawful consideration for a promise by a third person.

A separation deed, as we have above said, is avoided by subsequent reconciliation and cohabitation (h). If it were not so but could remain suspended in order to be revived in the event of a renewed separation, it might become equivalent to a contract

(a) On the effect of that case see the remarks in the House of Lords in a subsequent appeal as to the frame of the deed, *Wilson v. Wilson*, 5 H. L. C. 40; and by Lord Westbury, 4 D. F. J. 234.

(b) 4 D. F. J. 240.

(c) *Jee v. Thurlow*, 2 B. & C. 547.

(d) *Ib.*: *Evans v. Carrington*, 2 D. F. J. 481.

(e) *Charleworth v. Holt*, L. R. 9 Ex. 38.

(f) *Evans v. Carrington*, *supra*.

(g) 1 Bing. N. C. 656, in Ex. Ch. 5 Bing. N. C. 341, in H. L. 9 Cl. & F. 101. In the Ex. Ch. both Lord Abinger and Lord Denman dissented.

(h) See also *Westmeath v. Salisbury*, 5 Bl. N. S. 339.

providing for a contingent separation at a future time : and such a contract, as will immediately be seen, is not allowable. However a substantive and absolute declaration of trust by a third person contained in a separation deed has been held not to be avoided by a reconciliation (a).

As to all agreements or provisions for a *future* separation, whether post-nuptial (b) or ante-nuptial (c) (d), and whether proceeding from the parties themselves or from another person (d), it remains the rule of law that they can have no effect. If a husband and wife who have been separated are reconciled, and agree that in case of a future separation the provisions of a former separation deed shall be revived, this agreement is void (b). A condition in a marriage settlement varying the disposition of the income in the event of a separation is void (d). So is a limitation over (being in substance a forfeiture of the wife's life interest) in the event of her living separate from her husband through any fault of her own : though it might be good, it seems, if the event were limited to misconduct such as would be a ground for divorce or judicial separation (c).

Likewise a deed purporting to provide for an immediate separation is void if the separation does not in fact take place : for this shows that an immediate separation was not intended, but the thing was in truth a device to provide for a future separation (e). Nor can such a deed be supported as a voluntary settlement (f).

The distinction rests on the following ground. An agreement for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact become inevitable. Still that state of things is abnormal and not to be contemplated beforehand. "It is forbidden to provide for the possible dissolution of the marriage contract, which the policy

Agreements for future separation void.

Reason of the distinction.

(a) *Ruffles v. Alston*, 19 Eq. 539.

(b) *Marquis of Westmeath v. Marchioness of Westmeath*, 1 Dow & Cl. 519, 541 ; *Westmeath v. Salisbury*, 5 Bli. N. S. 339, 393.

(c) *H. v. W.* 3 K. & J. 882. Some of the reasons given in this case (at p. 386) cannot since *Hunt v. Hunt* be supported.

(d) *Cartwright v. Cartwright*, 3 D. M. G. 982 : note that this and the case last cited were after *Wilson v. Wilson*.

(e) *Hindley v. Marquis of Westmeath*, 6 B. & C. 200 ; confirmed by *Westmeath v. Salisbury*, 5 Bli. N. S. 339, 395-7.

(f) *Bindley v. Mulloney*, 7 Eq. 343.

of the law is to preserve intact and inviolate" (a). Or in other words, to allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves (b).

Immoral
publica-
tions :
Being
criminal
offences,
these are
contrary to
positive
law.

It is a well established rule that no enforceable right can be acquired by a blasphemous, seditious, or indecent publication, whether in words or in writing, or by any contract in relation thereto (c); but it does not really belong to the present head. The ground on which the cases proceed is that the publication is or would be a criminal offence; not merely immoral, but illegal in the strict sense. The criminal law prohibits it as *malum in se*, and the civil law takes it from the criminal law as *malum prohibitum*, and refuses to recognize it as the origin of any right (d). Then the decisions in equity profess simply to follow the law by refusing in a doubtful case to give the aid of equitable remedies to alleged legal rights until the existence of the legal right is ascertained (e). It would perhaps be difficult to assert as an abstract proposition that a Court administering civil justice might not conceivably pronounce a writing or discourse immoral which yet could not be the subject of criminal proceedings. But we do not know of such a jurisdiction having ever in fact been exercised; and considering the very wide scope of the criminal law in this behalf (f), it seems unlikely that there should arise any occasion for it. Some expressions are to be found which look like claims on the part of purely civil courts to exercise a general moral censorship apart from any reference to the criminal law. But these are overruled by modern authority. At the present day it is not true that "the Court of Chancery has a superintendency over all books, and might in a summary

(a) 3 K. & J. 382.

(b) Agreements between husband and wife contemplating a future judicial separation (*séparation de corps*) are void in French law: Sirey & Gilbert on Code Civ. art. 1133, no. 55.

(c) The somewhat analogous question—Will the law protect the trade mark of an article intended to deceive the public?—is left open by *Estcourt v. Estcourt Hop Essence Co.* 10 Ch. 276.

(d) *E.g. Stockdale v. Onwhyn*, 5 B. & C. 173.

(e) *Southey v. Sherwood*, 2 Mer. 435; *Laurence v. Smith*, Jac. 471. For a full account of the cases see Shortt on the Law relating to Works of Literature and Art, pp. 3-11.

(f) See Russell on Crimes, Bk. 2. c. 24, Starkie on Libel (3rd ed.) cc. 33, 34; and Stephen's Digest of the Criminal Law, artt. 91-95, 161, 172.

way restrain the printing or publishing any that contained reflections on religion or morality," as was once laid down by Lord Macclesfield; or that "the Lord Chancellor would grant an injunction against the exhibition of a libellous picture," as was laid down by Lord Ellenborough (a). On the whole one may safely say that for all practical purposes the civil law is determined by and co-extensive with the criminal law in these matters: the question in a given case is not simply whether the publication be immoral, but whether the criminal law would punish it as immoral.

A very curious doctrine of legal morality has been started in some of the United States since the abolition of slavery. It has been held that the sale of slaves being against natural right can be made valid only by positive law, and that no right of action arising from it can subsist after the determination of that law b). The Supreme Court of Louisiana in particular has adjudged that contracts for the sale of persons, though made in the State while slavery was lawful, must now be treated as void: but the Supreme Court of the U.S. did not hold itself bound by this view on appeal from the Circuit Court, and distinctly refused to adopt it, thinking that neither the Constitutional Amendment of 1865 nor anything that had happened since could avoid a contract good in its inception (c).

Contracts
as to slaves
in U.S. now
held void
in some
states
though
lawful
when
made.

C. *Agreements contrary to public policy.*

Before we go through the different classes of agreements which are void as being of mischievous tendency in some one of certain definite ways, something must be said on the more general question of the judicial meaning of "public policy." That question is, in effect, whether it is at the present day open to courts of justice to hold transactions or dispositions of property void simply because in the judgment of the Court it is against the public good that they should be enforced, although the grounds of such judgment may be novel. The general tendency of modern ideas is no doubt against the continuance of such a jurisdiction (d). On the other hand there is a good deal

Of the doc-
trine of
Public
Policy in
general.

(a) *Emperor of Austria v. Day and Kossuth*, 3 D. F. J. 217, 238.

(b) Story on Contracts § 671 (1.

647, 5th ed.)

(c) *Boyc v. Tubb*, 18 Wallace, 546.

(d) See for example 1 Sm. L.C. 400.

of modern and even recent authority which makes it difficult to deny its continued existence.

Its extension by anxiety of courts to discourage wagers, while wagers as such were valid contracts.

As a matter of history, there seems to be little doubt that the doctrine of public policy, so far as regards its continued assertion in a general form in modern times, if not its actual origin, arose from wagers being allowed as the foundation of actions at common law. Their validity was assumed without discussion until the judges repented of it too late. Regretting that wagers could be sued on at all (*a*), they were forced to admit that wagering contracts as such were not invalid, but set to work to discourage them so far as they could. This they did by becoming "astute even to an extent bordering upon the ridiculous to find reasons for refusing to enforce them" in particular cases (*b*).

Later remarks on these decisions. *Qu.* how far now law.

Thus a wager on the future amount of hop duty was held void, because it might expose to all the world the amount of the public revenue, and Parliament was the only proper place for the discussion of such matters (*c*). Where one proprietor of carriages for hire in a town had made a bet with another that a particular person would go to the assembly rooms in his carriage, and not the other's, it was thought (this, however, was not strictly necessary to the decision) that the bet was void, as tending to abridge the freedom of one of the public in choosing his own conveyance, and to expose him to "the inconvenience of being importuned by rival coachmen" (*d*). A wager on the duration of the life of Napoleon was void because it gave the plaintiff an interest in keeping the king's enemy alive, and also because it gave the defendant an interest in compassing his death by means other than lawful warfare (*e*). This was probably the extreme case, and has been remarked on as of doubtful authority (*f*). But the Judicial Committee held in 1848, on an Indian appeal (the Act 8 & 9 Vict. c. 109 not

(*a*) *Good v. Elliott*, 3 T. R. 693, where Buller, J. proposed (without success) to hold void all wagers on events in which the parties had no interest.

(*b*) Per Parke, B. *Egerton v. Earl Brownlow*, 4 H. L. C. at p. 124; per Williams, J. *ib.* 77; per Alderson, B. *ib.* 109.

(*c*) *Atherfold v. Beard*, 2 T. R. 610.

(*d*) *Eltham v. Kingsman*, 1 B. & Ald. 683.

(*e*) *Gilbert v. Sykes*, 16 East, 150.

(*f*) By Alderson, B. in *Egerton v. Earl Brownlow*, *supra*, and in the Privy Council in the case next cited, 6 Moo. P. C. 312.

extending to British India) that a wager on the price of opium at the next Government sale of opium was not illegal (a). The common law was thus stated by Lord Campbell in delivering the judgment :—

“I regret to say that we are bound to consider the common law of England to be that an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy. I look with concern and almost with shame on the subterfuges and contrivances and evasions to which Judges in England long resorted in struggling against this rule” (b).

It may surely be thought at least doubtful whether decisions so produced and so reflected upon can in our own time be entitled to any regard at all. But it has been said that they establish a distinction of importance between cases where the parties “have a real interest in the matter, and an apparent right to deal with it” and where they “have no interest but what they themselves create by the contract;” that in the former case the agreement is void only if “directly opposed to public welfare,” but in the latter “any tendency whatever to public mischief” will render it void (c). It is difficult to accept this distinction, or at any rate to see to what class of contracts other than wagers it applies. In the case of a lease for lives (to take an instance often used) the parties “have no interest but what they themselves create by the contract” in the lives named in the lease: they have not any “apparent right to deal with” the length of the Sovereign’s or other illustrious persons’ lives as a term of their contract: yet it has never been doubted that the contract is perfectly good.

The leading modern authority on “public policy” is the great *Egerton v. Earl Brownlow* (d). This, although not a case of contract, cannot possibly be left without special mention. By the will of the seventh Earl of Bridgewater a series of life

(a) By the Indian Contract Act, s. 30, agreements by way of wager are now void, with an exception in favour of prizes for horse-racing of the value of Rs. 500 or upwards.

(b) *Ramloll Thackoorseydass v. Soojumnul Dhondmull*, 6 Moo. P. C. 300, 310.

(c) 4 H. L. C. 148.

(d) 4 H. L. C. 1-250.

interests (*a*) were limited, subject to provisos which were generally called conditions, but were really conditional limitations by way of shifting uses upon the preceding estates (*b*). The effect of these was that if the possessor for the time being of the estates did not acquire the title of Marquis or Duke of Bridgewater, or did accept any inferior title, the estates were to go over. The House of Lords held by four to one, in accordance with the opinion of two judges (*c*) against eight (*d*) that the limitations were void as being against public policy.

Opinions
of Judges.

The whole subject was much discussed in the opinions on both sides. The greater part of the judges insisted on such considerations as the danger of limiting dispositions of property on speculative notions of impolicy (*e*); the vague and unsatisfactory character of a jurisdiction founded on general opinions of political expedience, as distinguished from a legitimate use of the policy (*i.e.* general intention, as we said above) of a particular law as the key to its construction, and the confusion of judicial and legislative functions to which the exercise of such a jurisdiction would lead (*f*); and the fallacy of supposing an object unlawful because it might possibly be sought by unlawful means, when no intention to use such means appeared (*g*). On the other hand it was pointed out that these limitations held out "a direct and powerful temptation to the exercise of corrupt means of obtaining the particular dignity" (*h*); that besides this the restraint on accepting any other dignity, even if it did not amount to forbidding a subject to obey the lawful commands of the Sovereign (*i*), tended in possible events to set private interest in

(*a*) Not estates of freehold with remainder to first and other sons in tail in the usual way, but a chattel interest for 99 years if the taker should so long live, remainder to the heirs male of his body. See Dav. Conv. 3, pt. 1. 351.

(*b*) See Lord St. Leonards' judgment, 4 H. L. C. at p. 208.

(*c*) Pollock, C. B. and Platt, B.

(*d*) Crompton, Williams, Cresswell, Talfourd, Wightman, and Erle, JJ., Alderson and Parke, BB. Coleridge, J. thought the limitations good in part only.

(*e*) Crompton, J. at p. 68.

(*f*) Alderson, B. at p. 106; Parke B. at p. 123.

(*g*) Williams, J. at p. 77; Parke, B. at p. 124.

(*h*) Platt, B. at p. 99; Lord St. Leonards at p. 232; Lord Brougham at p. 172.

(*i*) On this point the prevailing opinion, on the whole, was that a subject cannot refuse a peerage [cp. 5 Ric. 2. St. 2. c. 4], but cannot be compelled to accept it by any particular title, or at all events cannot be compelled to accept promotion by any particular new title if he is a peer already.

opposition to public duty (a) ; and that the provisoes as a whole were fitted to bias the political and public conduct of the persons interested, and introduce improper motives into it (b), and also to embarrass the advisers of the Crown, and influence them to recommend the grant of a peerage or of promotion in the peerage for reasons other than merit (c). Lord Lyndhurst, Lord Brougham, Lord Truro, and Lord St. Leonards adopted this view. Lord Cranworth dissented, adhering to his opinion in the Court below (d), and made the remark (which is certainly difficult to answer) that the *Thellusson* will, which the Courts had felt bound to uphold, was much more clearly against public policy than this. The fullest reasons on the side of the actual decision are those of Pollock, C.B. and Lord St. Leonards. Their language is very general, and they go far in the direction of claiming an almost unlimited right of deciding cases according to the judge's view of public policy for the time being. Lord St. Leonards mentioned the fluctuations of the decisions on agreements in restraint of trade as showing that rules of common law have been both created and modified by notions of public policy. But, assuming the statement to be historically correct (e), the inference would seem, with all submission to so great an authority, to be grounded on a confusion between the purely legal and the historical point of view. In theory the common law does not vary. In fact we know that it does vary (though in modern times the limits of variation are narrowed), but the fact of the variation is no argument for an unlimited power of judicial legislation in this more than in any other class of questions. He also said that each case was to be decided upon principle, but abstract rules were not to be laid down (f). Perhaps this may be taken to mean only that (as in the case of fraud) the Court is to be guided by recognized principles, but it is useless to attempt a minute and exhaustive definition of the cases that may fall within them : in other words, that we must

Opinions
in House
of Lords.

(a) Pollock, C. B. at p. 151.

(b) Lord Lyndhurst, at p. 163.

(c) Pollock, C. B. and Lord St. Leonards, *supra*.

(d) 1 Sim. N. S. 464.

(e) In fact it seems doubtful. The cases on wagers are anomalous, as above shown : and as to restraint of

trade it appears from the book that Hull, J. was really alone in his opinion in the *Dyer's* ca. in 2 H. 5. See, however, as to the variation of the "policy of the law" in general, *Evanturel v. Evanturel*, L. R. 6 P. C. at p. 29.

(f) At pp. 238-9.

Effect of
the deci-
sion itself:
it does not
create a
new head
of "public
policy."

be content with reasoning by way of analogy rather than deduction. If so, the proposition is doubtless correct and important (though by no means confined to this topic); but if it means to say that the Court may lay down new principles of public policy without any warrant even of analogy, it seems of doubtful and dangerous latitude. But it is necessary to consider whether the *ratio decidendi* of the case does in truth require any of these wide assertions of judicial discretion. And it is not very difficult to perceive that it does not. The limitations in question were held bad because they amounted in effect to a gift of pecuniary means to be used in obtaining a peerage, and offered a direct temptation to the improper use of such means, and the improper admission of private motives of interest in political conduct: in short, because in the opinion of the Court they had a manifest tendency to the prejudice of good government and the administration of public affairs. But it is perfectly well recognized that transactions which have this character are all alike void, however different in other respects. Such are champerty and maintenance, the compounding of offences, and the sale of offices. The question in the particular case was whether there was an apparent tendency to mischiefs of this kind, or only a remote possibility of inconvenient consequences. The decision did not create a new kind of prohibition, but affirmed the substantial likeness of a very peculiar and unexampled disposition of property to other dispositions and transactions already known to belong to a forbidden class. And the broadly expressed language of certain parts of the judgments may be taken, it is submitted, as applicable only within the bounds of that particular class.

Egerton v. Earl Brownlow, however, is certainly a cardinal authority for one rule which applies in all cases of "public policy:" namely that the tendency of the transaction at the time, not its actual result, must be looked to. It was urged in vain that the will of the seventh Earl of Bridgewater had in fact been in existence for thirty years without producing any visible ill effects (a).

The view here put forward, that there is really nothing in the

(a) Cp. *Da Costa v. Jones*, Cowp. 729. Wager on sex of third person void, as offensive to that person and tending to indecent evidence: not-

withstanding it did not appear that the person had made any objection, and the cause had in fact been tried without any indecent evidence.

case to warrant the invention of new heads of "public policy" seems to be borne out by the remarks of the Master of the Rolls in a late case :—

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract" (a).

We now proceed to the several heads of the subject.

A. First, as to matters concerning the commonwealth in its relations with foreign powers.

A. Public policy as touching external relations of the State.

"On the principles of the English law it is not competent to any" domiciled British (b) "subject to enter into a contract to do anything which may be detrimental to the interests of his own country" (c).

An agreement may be void for reasons of this kind either when it is for the benefit of an enemy, or when the enforcement of it would be an affront to a friendly state.

As to the first and more important branch of this rule : "It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal" (d).

Trading with enemy.

The case of *Potts v. Bell* (e), decided by the Exchequer Chamber in 1800, is the leading authority on this subject. The following points were there decided :

Potts v. Bell

It is a principle of the common law (f) that trading with an enemy without licence from the Crown is illegal.

(a) *Printing and Numerical Registering Co. v. Sampson*, 19 Eq. 462, 465.

(b) The rule does not apply to British subjects domiciled abroad : *Bell v. Reid*, 1 M. & S. 726.

(c) 7 E. & B. 782.

(d) *Esposito v. Bowden* (in Ex.Ch.) 7 E. & B. 763, 779.

(e) 8 T. R. 548.

(f) In the Admiralty it was already beyond question : see the series of precedents cited in *Potts v. Bell*.

Purchase of goods in an enemy's country during the war is trading with the enemy, though it be not shown that they were actually purchased from an enemy : and an insurance of goods so purchased is void.

As to insurances originally effected in time of peace : "When a British subject insures against captures, the law infers that the contract contains an exception of captures made by the Government of his own country" (a).

Effect of
war on
subsisting
contracts.

The effect of the outbreak of war upon subsisting contracts between subjects of the hostile states varies according to the nature of the case. It may be that the contract can be lawfully performed by reason of the belligerent governments or one of them having waived their strict rights : and in such case it remains valid. In *Clementson v. Blessig* (b) goods had been ordered of the plaintiff in England by a firm at Odessa before the declaration of war with Russia. By an order in Council six weeks were given after the declaration of war for Russian merchant vessels to load and depart, and the plaintiff forwarded the goods for shipment in time to be lawfully shipped under this order : it was held that the sale remained good.

If the contract cannot at once be lawfully performed, then it is suspended during hostilities (c) unless the nature or objects of the contract be inconsistent with a suspension, in which case "the effect is to dissolve the contract and to absolve both parties from further performance of it" (d). The outbreak of a war dissolves a partnership previously existing between subjects of the two hostile countries (e).

In *Esposito v. Bowden* (d) a neutral ship was chartered to proceed to Odessa, and there load a cargo for an English freighter, and before the ship arrived there war had broken out between England and Russia, and continued till after the time when the loading should have taken place : here the contract could not

(a) *Furtado v. Rodgers*, 3 B. & P. 191, 200 ; *Ex parte Lee*, 13 Ves. 64.

(b) 11 Ex. 135, and on the subject generally see the reporters' note, pp. 141-5.

(c) *Ex parte Boussmaker*, 13 Ves. 71.

(d) *Esposito v. Bowden*, 7 E. & B. 763, 783, 27 L. J. Q. B. 17 (in Ex. Ch.) revg. s.c. 4 E. & B. 963, 24 L. J. Q. B. 210. For a later application of the same reason of convenience cp.

Geipel v. Smith, L. R. 7 Q. B. 404. A contract to carry goods has been held to be only suspended by a temporary embargo, though it lasted two years : *Hadley v. Clarke*, 8 T. R. 259. *Sed qu.* is not this virtually overruled by *Esposito v. Bowden*.

(e) *Griswold v. Waddington*, 15 Johns. (Sup. Ct. N. Y.) 57, in error, 16 *ib.* 438.

be performed without trading with the enemy, and in such a case it is convenient that it should be dissolved at once, so that the parties need not wait indefinitely for the mere chance of the war coming to an end, or its otherwise becoming possible to perform the contract lawfully.

Questions have arisen on the validity of bills of exchange drawn on England in a hostile country in time of war. Here the substance of the transaction has to be looked at, not merely the nationality of the persons who are ultimately parties to an action on the bill. Where a bill was drawn on England by an English prisoner in a hostile country, this was held a lawful contract, being made between English subjects; and by the necessity of the case an indorsement to an alien enemy was further held good, so that he might well sue on it after the return of peace (*a*). But a bill drawn by an alien enemy on a domiciled British subject, and indorsed to a British subject residing in the enemy's country, was held to give no right of action even after the end of the war: for this was a direct trading with the enemy on the part of the acceptor (*b*). It seems proper to observe that these cases must be carefully distinguished from those which relate only to the personal disability of an alien enemy to sue in our courts during the war (*c*).

Bills of exchange between England and hostile country.

On the other hand, an agreement cannot be enforced in England which has for its object the conduct of hostilities against a power at peace with the English government, at all events by rebellious subjects of that power who are endeavouring to establish their independence, but have not yet been recognized as independent by England. This was laid down in cases arising out of loans contracted in this country on behalf of some of the South American Republics before they had been officially recognized.

Hostilities against friendly nation can't be subject of lawful contract.

"It is contrary to the law of nations, which in all cases of international law is adopted into the municipal code of every civilized country, for persons in England to enter into engagements to raise money to support the subjects of a government in amity with our

(*a*) *Antoine v. Morshead*, 6 Taunt. 237, cp. *Daubuz v. Morshead*, *ib.* 332.

(*b*) *Willison v. Patteson*, 7 Taunt. 439. The circumstances of the indorsement seem immaterial.

(*c*) Such are *McConnell v. Hector*, 3 B. & P. 113; *Brandon v. Nesbitt*, 6 T. R. 23. As to prisoners of war here, *Sparenburgh v. Bannatyne*, 1 B. & P. 163.

own in hostilities against their government, and no right of action can arise out of such a transaction" (a).

The Supreme Court of the United States has held however that an assignment of shares in a company originally formed for a purpose of this kind was so remotely connected with the original illegality of the loan as not to be invalid between the parties to it (b).

Neutral trade with belligerents is at risk of capture only, not unlawful.

It is not a "municipal offence by the law of nations" for citizens of a neutral country to carry on trade with a blockaded port—that is, the courts of their own country cannot be expected to treat it as illegal (though of course it is done at the risk of seizure, of which seizure, if made, the neutral trader or his government cannot complain): and agreements having such trade for their object—*e.g.* a joint adventure in blockade-running—are accordingly valid and enforceable in the courts of the neutral state (c).

Several decisions on this topic of aiding or trading with enemies have been given in the American courts in cases arising out of the Civil War. They will be found collected in the last edition of Mr. Story's work (d).

Exceptional treatment of foreign revenue laws.

It is admitted as a thing required by the comity of nations that an agreement to contravene the laws of a foreign country would in general be unlawful. But it is said that revenue laws (in practice the most important case) are excepted, and that "no country ever takes notice of the revenue laws of another" (e).

As a general proposition, however, this is strongly disapproved by most modern writers as contrary to reason and justice (f). It should be noted that our courts, so far as they have acted upon it, have done so to the prejudice of our own revenue quite

(a) Best, C. J. *De Witz v. Hendricks*, 2 Bing. 314. Cp. *Thompson v. Powles*, 2 Sim. 194, where the language seems unnecessarily wide.

(b) *McBlair v. Gibbes*, 17 Howard 232.

(c) *Ex parte Chavasse*, 4 D. J. S. 655, see Lord Westbury's judgment; *The Helen*, L. R. 1 Ad. & Ecc. 1, and American authorities there cited; Kent, Comm. 3. 267.

(d) *Texas v. White*, 7 Wallace 700 (where however the chief points are

of constitutional law); *Hanauer v. Doane*, 12 *ib.* 342; Story on Contracts, § 744. *Sprott v. U. S.*, 20 Wall. 459, goes beyond anything in our books, and the dissent of Field J. seems well founded.

(e) Lord Mansfield in *Holman v. Johnson*, Cowp. 341.

(f) Kent, Comm. 3. 263-266; Westlake on Private International Law, 185; Wharton, Conflict of Laws, §§ 484-5.

as much as to that of foreign states. Thus a complete sale of goods abroad by a foreign vendor is valid, and the price may be recovered in an English court, though he knew of the buyer's intention to smuggle the goods into England. "The subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this" (a). But it is admitted that an agreement to be performed in England in violation of English revenue laws would be void—as if, for example, the goods were to be smuggled by the seller and so delivered in England. And a subject domiciled in the British dominions (though not in England or within the operation of English revenue laws) cannot recover in an English court the price of goods sold by him to be smuggled into England (b); and even a foreign vendor cannot recover if he has himself actively contributed to the breach of English revenue laws, as by packing the goods in a manner suitable and to his knowledge intended for the purpose of smuggling (c).

The cases upholding contracts of this kind, whether as against our own or as against foreign laws, would probably not be now extended beyond the points specifically decided by them, and perhaps not altogether upheld (d). There is one modern case which looks at first sight like an authority for saying that our courts pay no regard to foreign shipping registration laws: but it really goes upon a different principle, and, besides, the law of the United States was not properly brought before the Court (e).

As to instruments which cannot be used in their own country for want of a stamp, it is now settled that regard will be paid by the courts of other States to the law which regulates them, and the only question is as to the real effect of that law. If it is a mere rule of local procedure, requiring the stamp to make the instrument admissible in evidence, a foreign court, not being

Foreign
stamp
laws.

(a) *Holman v. Johnson*, Cowp. 431; *Pellicat v. Angell*, 2 C. M. & R. 311-3, per Lord Abinger, C. B.

(b) *Clugas v. Penaluna*, 4 T. R. 466. It seems, but it is not quite certain, from this case, that mere knowledge of the buyer's intention would disentitle him.

(c) *Waymell v. Reed*, 5 T. R. 599.

(d) It must be remembered that the general law as to sale of goods, &c., which the seller knows will be used for an unlawful purpose, was not fully settled at the date of these authorities.

(e) *Sharp v. Taylor*, 2 Ph. 801, see *Lindley on Partnership*, 1. 210.

bound by such rules of procedure, will not reject the instrument as evidence : it is otherwise if the local law "makes a stamp necessary to the validity of the instrument," *i. e.* a condition precedent to its having any legal effect at all (*a*).

B. Public policy as touching internal government. Corrupt or improper influence on public officers or legislature.

B. As to matters touching good government and the administration of justice.

It is needless to produce authorities to show that an agreement whose object is to induce any officer of the State, whether judicial or executive, to act partially or corruptly in his office, must in any civilized country be absolutely void. But an agreement which has an apparent tendency that way, though an intention to use unlawful means be not admitted, or even be nominally disclaimed, will equally be held void. In the case of *Egerton v. Earl Brownlow*, of which an account has been given a few pages above, it was held that the descent of an estate could not be made to depend on any public event in which the interest of the nation was concerned : or, to put it a little more broadly in one way and a little more definitely in another, that all transactions are void which create contingent interests of a nature to put the pressure of extraneous and improper motives upon the counsels of the Crown or the political conduct of legislators.

Marshall v. Baltimore & Co., Co. (Sup. Court U. S.)

A decision in the American Supreme Court which happens to be of nearly the same date shows that an agreement is void which contemplates the use of underhand means to influence legislation. In *Marshall v. Baltimore and Ohio Railroad Co.* (*b*) the nature of the agreement sued on appeared by a letter from the plaintiff to the president of the railway board, in which he proposed a plan for obtaining a right of way through Virginia for the company and offered himself as agent for the purpose. The letter pointed though not in express terms to the use of secret influence on particular members of the legislature : and it referred to an accompanying document which explained the nature of the plan in more detail. This document contained the following passage :—" I contemplate the use of no improper

(*a*) See Wharton, *Conflict of Laws*, 275.
 §§ 685-8; *Bristow v. Sequeville*, 5 Ex. (b) 16 Howard 314.

means or appliances in the attainment of your purpose. My scheme is to surround the legislature with respectable agents, whose persuasive arguments may influence the members to do you a naked justice. This is all I require—secrecy from motives of policy alone—because an open agency would furnish ground of suspicion and unmerited invective, and might weaken the impression we seek to make.” The arrangement was to be as secret as practicable: the company was to have but one ostensible agent, who was to choose such and so many sub-agents as he thought proper: and the payment was to be contingent on success. The actual contract was made by a resolution of the directors, according to which agents were to be employed to “superintend and further” the contemplated application to the legislature of Virginia “and to take all proper measures for that purpose;” and their right to any compensation was to be contingent on the passing of the law. The Supreme Court held, first, that it was sufficiently clear that the contract was in fact made on the footing of the previous communications, and was to be carried out in the manner there proposed; and secondly, that being so made it was against public policy and void.

“It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. . . . Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that Courts should put the stamp of their disapprobation on every act and pronounce void every contract the ultimate [*qu. immediate?*] or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.” [The judgment then points out that persons interested in the results of pending legislation have a right to urge their claims either in person or by agents, but in the latter case the agency must be open and acknowledged.] “Any attempts to deceive persons intrusted with the high functions of legislation by secret combinations, or to create or bring into operation undue influences of any kind, have all the effects of a direct fraud on the public” (a).

And the result of the previous authorities was stated to be—

(a) 16 Howard, at pp. 334-5.

"1st. That all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, are (a) void by the policy of the law.

"2nd. Secrecy as to the character under which the agent or solicitor acts tends to deception and is immoral and fraudulent, and where the agent contracts to use secret influences, or voluntarily without contract with his principal uses such means, he cannot have the assistance of a court to recover compensation.

"3rd. That what in the technical vocabulary of politicians is termed 'log-rolling' (b) is a misdemeanour at Common Law punishable by indictment" (c).

So in a later case (d) an agreement to prosecute a claim before Congress by means of personal influence and solicitations of the kind known as "lobby service" has been held void.

Otherwise
of contract
by person
interested
to with-
draw oppo-
sition ;
Simpson v.
Lord How-
den.

But as it is open to a landowner or other interested person to defend his interest by all lawful means against proposed legislation from which he apprehends injury, so it is open to him to withdraw or compromise his claims on any terms he thinks fit. There is no reason against bargains of this kind any more than against a compromise of disputed civil rights in ordinary litigation. And the lawfulness of such an agreement is not altered if it so happens that the party is himself a member of the legislature. In the absence of anything to show the contrary, he is presumed to make the agreement solely in his character of a person having a valuable interest of his own in the matter, and he is not to be deprived of his rights in that character merely because he is also a legislator (e). "A landowner cannot be restricted of his rights because he happens to be a member of Parliament" (f). This may seem a little anomalous : but it must be remembered that in practice there is little chance of a conflict between duty and interest, as the legislature generally informs itself on these matters by means of committees proceeding in a quasi-judicial manner. Of course it would be improper for a member personally interested to sit on such a committee.

(a) "is" by a clerical error in the report.

(b) Arrangements between members for the barter of votes on private bills.

(c) 16 Howard 336.

(d) *Trist v. Child*, 21 Wall. 441.

(e) *Simpson v. Lord Howden*, 10 A. & E. 793, 9 Cl. & F. 61.

(f) *Kindersley, V.-C. in Earl of Shrewsbury v. N. Staffordshire Ry. Co.* 1 Eq. 593, 613.

On similar grounds it is said that the sale of offices (which is forbidden by statutes extending to almost every case) is also void at common law (a). However there may be a lawful partnership in the emoluments of offices although a sale of the offices themselves or a complete assignment of the emoluments would be unlawful (b). The same principles are applied to other appointments which though not exactly public offices are concerned with matters of public interest. "Public policy requires that there shall be no money consideration for the appointment to an office in which the public are interested: the public will be better served by having persons best qualified to fill offices appointed to them; but if money may be given to those who appoint, it may be a temptation to them to appoint improper persons." Therefore the practice which had grown up in the last century of purchasing commands of ships in the East India Company's service was held unlawful no less on this ground than because it was against the Company's regulations (c).

In like manner a secret agreement to hand over to another person the profits of a contract made for the public service, such as a Post Office contract for the conveyance of mails, is void (d).

Nevertheless many particular offices, and notably subordinate offices in the courts of justice, were in fact saleable and the subject of sale by custom or otherwise until quite modern times. But the commission of an officer in the army could not be the subject of a valid *pledge* even under the system of purchase recently abolished (e).

For like reasons certain assignments of salaries and pensions have been held void, as tending to defeat the public objects for which the original grant was intended. Thus military pay and judicial salaries are not assignable. The rule is that "a pension for past services may be aliened, but a pension for supporting the grantee in the performance of future duties is inalienable": and therefore a pension given not only as a reward for past services, but for the support of a dignity created at the same time and

(a) *Hanington v. Du Chastel*, 2 Swanst. 159, n.; *Hopkins v. Prescott*, 4 C. B. 578, per Coltman, J.

(b) *Serry v. Clifton*, 9 C. B. 110.

(c) *Blackford v. Preston*, 8 T. R.

89, 93.

(d) *Osborne v. Williams*, 13 Ves. 379.

(e) *Collyer v. Fallon*, T. & R. 459.

for the same reason, is inalienable (a). But an assignment by the holder of a public office of a sum equivalent to a proportionate part of salary, and secured to his legal personal representatives on his death by the terms of his appointment, is not invalid, such a sum being simply a part of his personal estate like money secured by life insurance (b). In a late case a mortgage by an officer of the Customs of his disposable share in the "Customs Annuity and Benevolent Fund" created by a special Act was unsuccessfully disputed as contrary to the policy of the Act (c).

Inter-
ference
with
course of
justice.
In criminal
proceed-
ings.
"Stifling
prosecu-
tions."
Williams
v. Bayley.

Agreements for the purpose of "stifling a criminal prosecution" are void as tending to obstruct the course of public justice. An agreement made in consideration ostensibly of the giving up of certain promissory notes, the notes in fact having forged indorsements upon them, and the real consideration appearing by the circumstances to be the forbearance of the other party to prosecute, was not long ago held void on this ground in the House of Lords. The principle of the law as there laid down by Lord Westbury is "That you shall not make a trade of a felony" (d).

Keir v.
Leeman.

However the principal direct authority must still be sought in the earlier case of *Keir v. Leeman* (e). The Court of Queen's Bench there said :—

"The principle of law is laid down by Wilmot, C. J. in *Collins v. Blantern* (f) that a contract to withdraw a prosecution for perjury and consent to give no evidence against the accused is founded on an unlawful consideration and void. On the soundness of this decision no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion ; if guilty, the law was eluded by a corrupt compromise screening the criminal for a bribe. [The cases are then reviewed.] We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in

(a) *Davis v. Duke of Marlborough*, 1 Swanst. 74, 79. Cp. *Arbuthnot v. Norton*, 5 Moo. P. C. 219. And see authorities collected in notes to *Ryall v. Rowles*, 2 Wh. & T. L. C.

(b) *Arbuthnot v. Norton*, *supra*.

(c) *Macleane's trusts*, 19 Eq. 274.

(d) *Williams v. Bayley*, L. R. 1 H. L. 200, 220.

(e) 6 Q. B. 308, in Ex. Ch. 9 Q. B. 371.

(f) 1 Sm. L. C. 369, 382.

which he can obtain redress. But if the offence is of a public nature no agreement can be valid that is founded on the consideration of stifling a prosecution for it" (a).

Accordingly the Court held that an indictment for offences including riot and obstruction of a public officer in the execution of his duty cannot be legally the subject of a compromise. The judgment of the Exchequer Chamber (b) affirmed this, but showed some dissatisfaction even with the limited right of compromise admitted in the Court below. It was observed that there was really very little authority for it; and although it was not actually so laid down, it looks as if the Court would have been ready to decide if necessary that the compromise of any criminal offence is illegal. In a late case, however, the Court of Appeal entertained no doubt that where there is a choice of a civil or criminal remedy a compromise of criminal as well as civil proceedings is lawful (c).

It is not compounding felony for a person whose name has been forged to a bill to adopt the forged signature and advance money to the forger to enable him to take up the bill. It is doubtful whether a security given by the forger for such advance is valid: but he cannot himself actively dispute it (on the principle *potior est conditio defendentis*, of which afterwards), nor can his trustee in bankruptcy, who for this purpose is in no better position than himself, as there is in any case no offence against the bankrupt laws (d).

The compounding of offences under penal statutes is expressly forbidden by 18 Eliz. c. 5, s. 5. 18 Eliz. c. 5.

An election petition, though not a criminal proceeding, is a proceeding of a public character and interest which may have penal consequences; and an agreement for pecuniary consideration not to proceed with an election petition is void at common law, as its effect would be to deprive the public of the benefit which would result from the investigation (e). Compromise of election petition.

(a) Acc. in *Clubb v. Hutson*, 18 C. B. N. S. 414, held that forbearance to prosecute a charge of obtaining money by false pretences is an illegal consideration.

(b) 9 Q. B. at p. 392.

(c) *Fisher & Co. v. Apollinaris Co.* 10 Ch. 297.

(d) *Ex parte Caldecott*, 4 Ch. D. 150.

(e) *Coppock v. Bower*, 4 M. & W. 361.

In like manner an agreement for the collusive conduct of a divorce suit is void (*a*), and an agreement not to expose immoral conduct has been held void as against public policy (*b*).

In civil proceedings. Compromise improperly procured: *Cooth v. Jackson*.

Agreements relating to proceedings in civil courts, and involving anything inconsistent with the full and impartial course of justice therein, though not open to the charge of anything like actual corruption, are likewise held void. Where an agreement for compromise of a suit (a thing regarded as in itself rightful and even laudable) was in fact founded on information privily given to one of the parties by an officer of the court in violation of his duty (such information not being specific, but a general intimation that it would be for the party's interest to compromise), Lord Eldon held that it could not be enforced (*c*).

Secret agreement as to conduct of winding-up: *Elliott v. Richardson*.

In a recent case a shareholder in a company which was in course of compulsory winding up agreed with other shareholders who were also creditors, in consideration of being indemnified by them against all future calls on his shares, that he would help them to get an expected call postponed, and also support their claim: it was held that "such an agreement amounts to an interference with the course of public justice": for the clear intention of the Winding-up Acts is that the proceedings should be taken with reasonable speed so that the company's affairs may be settled and the shareholders relieved; and therefore any secret agreement to delay proceedings to the prejudice of the other shareholders and creditors is void (*d*). This comes near to the cases of secret agreements with particular creditors in bankruptcy or composition: and those cases do in fact rest partly on this ground. But the direct fraud on the other creditors is the chief element in them, and we have therefore spoken of them under an earlier head (p. 247).

Agreements for reference to arbitration, how far valid at Common Law.

Agreements to refer disputes to arbitration are, or rather were, to a certain extent regarded as encroachments on the proper authority of courts of justice by the substitution of a "domestic forum" of the parties' own making. At common law such an agreement, though so far valid that an action can be maintained

(a) *Hope v. Hope*, 8 D. M. G. 731. 31, 32.

(b) *Brown v. Brine*, 1 Ex. D. 5.

(c) *Cooth v. Jackson*, 6 Vea. 11,

(d) *Elliott v. Richardson*, L. R. 5 C. P. 744, 748-9, per Willes, J.

for a breach of it (a), does not "oust the ordinary jurisdiction of the Court"—that is, cannot be set up as a bar to an action brought in the ordinary way to determine the very dispute which it was agreed to refer. Nor can such an agreement be specifically enforced (b), or used as a bar to a suit in equity (c). It is said however "that a special covenant not to sue *may* make a difference" (c). And the law has not been directly altered (c) : but the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125, s. 11) gave the courts a discretion to stay proceedings in actions or suits on the subject-matter of an agreement to refer, which amounts in practice to enabling them to enforce the agreement : and this discretion has as a rule been exercised by courts both of law (d) and of equity (e) in the absence of special circumstances, such as a case of actual fraud, or where the defendant appeals to an arbitration clause not in good faith, but merely for the sake of vexation or delay (f). A question whether on the true construction of an arbitration clause the subject-matter of a particular dispute falls within it is not to be treated as a preliminary question for the Court, but is itself to be dealt with by the arbitrator ; for "in most of such cases the real question between the parties is whether the matter in dispute is within or without the agreement" (g).

Practically enforce-
able under
C. L. P.
Act, 1854.

It seems however that when the question is whether an agreement containing an arbitration clause is or is not determined, that question is not one for arbitration, since the arbitration clause itself must stand or fall with the whole agreement (h).

Certain statutory provisions for the reference to arbitration of internal disputes in friendly and building societies have been decided (after some conflict) to be compulsory and to exclude the

Special
statutory
arbitration
clauses.

(a) *Livingston v. Ralli*, 5 E. & B. 132, 24 L. J. Q. B. 269.

(b) *Street v. Rigby*, 6 Ves. 815, 818.

(c) *Cooke v. Cooke*, 4 Eq. 77, 86-7.

(d) *Randegger v. Holmes*, L. R. 1 C. P. 679; *Seligmann v. Le Boutillier*, *ib.* 681.

(e) *Willesford v. Watson*, 14 Eq. 572, 8 Ch. 473; *Plews v. Baker*, 16 Eq. 564.

(f) 14 Eq. 578; *Witt v. Corcoran*, 8 Ch. 476, n., 16 Eq. 571; *Lindley*,

2. 893-4. The enactment applies only where there is at the time of action brought an existing agreement for reference which can be carried into effect. *Randell, Saunders & Co. v. Thompson*, (C. A.) 1 Q. B. D. 748.

(g) *Willesford v. Watson*, 8 Ch. 478, per Lord Selborne, C.; *Gillett v. Thornton*, 19 Eq. 599.

(h) Per James, L. J. in *Llanelly Ry. & Dock Co. v. L. & N. W. Ry. Co.* 8 Ch. at p. 948.

ordinary jurisdiction of the courts (*a*). The Railway Companies' Arbitration Act 1859 is also compulsory (*b*).

Agreement of parties may make right of action conditional on arbitration.

Moreover parties may if they choose make arbitration a condition precedent to any right arising at all, and in that case the foregoing rules are inapplicable : as where the contract is to pay such an amount as shall be determined by arbitration or found due by the certificate of a particular person (*c*). Whether this is in fact the contract, or it is an absolute contract to pay in the first instance, with a collateral provision for reference in case of difference as to the amount, is a question of construction on which there has been some difference of opinion in recent cases (*d*).

Maintenance and champerty.

We now come to a class of transactions which are specially discouraged as tending to pervert the due course of justice in civil suits.

These are the dealings which are held void as amounting to or being in the nature of champerty or maintenance. The principle of the law on this head has been defined to be "that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce" (*e*). Maintenance is properly a general term of which champerty is a species. Their most usual meanings (together with certain additions and distinctions now obsolete) are thus given by Coke :—

"First, to maintain to have part of the land or anything out of the land or part of the debt, or any other thing in plea or suit ; and this is called *cambipartia* [*champart, campi partitio*], champertie."

The second is, "when one maintaineth the one side without having any part of the thing in plea or suit" (*f*). Champerty

(*a*) *Thompson v. Planet Benefit Building Society*, 15 Eq. 333 ; *Wright v. Monarch Investment Building Society*, 5 Ch. D. 726. Not so where the real question is whether a party claiming against the society is a member of the society at all, *Prentice v. London*, L. R. 10 C. P. 679.

(*b*) *Watford & Rickmansworth Ry. Co. v. L. & N. W. Ry. Co.* 8 Eq. 231.

(*c*) *Scott v. Avery*, 5 H. L. C. 811 ; which does not overrule the former general law on the subject, see the

judgments of Brett, J., and Kelly, C. B., in Ex. Ch. in *Edwards v. Aberayron, &c. Society*, 1 Q. B. D. 563 ; *Scott v. Corporation of Liverpool*, 3 De G. & J. 334.

(*d*) *Elliott v. Royal Exchange Assurance Co.* L. R. 2 Ex. 237 ; *Dawson v. Fitzgerald*, (C. A.) 1 Ex. D. 257, revg. S. C. L. R. 9 Ex. 7.

(*e*) By Lord Abinger in *Prosser v. Edmonds*, 1 Y. & C. Ex. 481, 497.

(*f*) Co. Lit. 368 *b*. Every champerty is maintenance, 2 Ro. Ab. 119 R.

may accordingly be described as "maintenance aggravated by an agreement to have a part of the thing in dispute" (a).

Agreements falling distinctly within these descriptions are punishable under certain statutes (b). It has always been considered, however, that champerty and maintenance are offences at common law, and that the statutes only declare the common law with additional penalties (c).

Whether by way of abundant caution or for other reasons, the law was in early times applied or at any rate asserted with extreme and almost absurd severity (d). It was even contended, as we had occasion to see in the last chapter, that the absolute beneficial assignment of a contract was bad for maintenance. The modern cases, however, proceed not upon the letter of the statutes or of the definitions given by early writers, but upon the real object and policy of the law, which is to repress that which Knight Bruce, L. J. spoke of as "the traffic of merchandising in quarrels, of huckstering in litigious discord," which decent people hardly require legal knowledge to warn them from, and which makes the business and profit of "breedbates, barretors, counsel whom no Inn will own, and solicitors estranged from every roll" (e). On the other hand the Courts have not deemed themselves bound to permit things clearly within the mischief aimed at any more than to forbid things clearly without it. They have in fact taken advantage of the doctrine that the statutes are only in affirmance of the common law to treat them as giving indications rather than definitions; as bearing witness to the general "policy of the law" but not exhausting or restricting it. It is not considered necessary to decide that a particular transaction amounts to the actual offence of champerty or maintenance in order to disallow it as a ground of civil rights: it will be void as "savouring of maintenance" if it clearly tends to the same kind of mischief.

The cases are somewhat numerous, and various in their

(a) Bovill, *arg.* in *Sprye v. Porter*, 7 E. & B. 58, 26 L. J. Q. B. 64.

(b) 3 Ed. 1. (Stat. Westm. 1) c. 25; 13 Ed. 1 (Stat. Westm. 2) c. 49; 28 Ed. 1. st. 1. c. 11; Stat. de Conspiratoribus, temp. incert.; 20 Ed. 3, c. 4; 1 Ric. 2. c. 4; 7 Ric. 2. c. 15; and 32 H. 8. c. 9, of which

more presently.

(c) *Pechell v. Watson*, 8 M. & W. 691, 700; 2 Ro. Ab. 114 D.

(d) See Bacon's Abridgment, Maintenance, A. (5. 250).

(e) *Reynell v. Sprye*, 1 D. M. G. at pp. 680, 686.

Relation
of the
statutes
to the
common
law, and
modern
policy of
the law.

special circumstances. A full examination of them would lead us to a length out of proportion to the place of the subject here (a). Their general effect, however, is sufficiently clear. Of maintenance pure and simple, an important head in the old books, there are very few modern examples; almost all the decisions illustrate the more special rule against champerty, namely that "a bargain whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action, is illegal" (b). On this head the rules now established appear to be as follows:—

Rules as
to cham-
perty.

(a) An agreement to advance funds or supply evidence with or without professional assistance (or, it seems, professional assistance only) (c) for the recovery of property in consideration of a remuneration contingent on success and proportional to or be paid out of the property recovered is void (d).

(β) A solicitor cannot purchase the subject-matter of a pending suit from his client in that suit (e): but he may take a security upon it for advances already made and costs already due in the suit (f).

(γ) Except in the case last mentioned, the purchase of property the title to which is disputed, or which is the subject of a pending suit, or an agreement for such purchase, is not in itself unlawful (g): but such an agreement is unlawful and void if the real object of it is only to enable the purchaser to maintain the suit (h).

We proceed to deal shortly with these propositions in order.

(a) A singularly concise and accurate statement of the principal decisions down to 1867 will be found in Leake on Contracts, 385-6.

(b) Per Blackburn, J. *Hutley v. Hutley*, L. R. 8 Q. B. 112.

(c) Per Jessel, M. R. *Re Attorneys and Solicitors Act*, 1 Ch. D. 573, where the agreement was to pay the solicitors in the event of success a percentage of the property recovered; but probably the real meaning of it was that the solicitors should find the funds. Cp. *Grell v. Levy*, 16 C. B. N. S. 73, and *Strange v. Brennan*, cited p. 298 below.

(d) *Stanley v. Jones*, 7 Bing. 369;

Reynell v. Sprye, 1 D. M. G. 660; *Sprye v. Porter*, 7 E. & B. 58, 26 L. J. Q. B. 64; *Hutley v. Hutley*, L. R. 8 Q. B. 112.

(e) *Wood v. Downes*, 18 Ves. 120; *Simpson v. Lamb*, 7 E. & B. 84.

(f) *Anderson v. Radcliffe* (Ex. Ch.), E. B. & E. 806, 29 L. J. Q. B. 128.

(g) *Hunter v. Daniel*, 4 Ha. 420; *Knight v. Bowyer*, 2 De G. & J. 421, 444.

(h) *Prosser v. Edmonds*, 1 Y. & C. Ex. 481; *Harrington v. Long*, 2 My. & K. 590; *De Hoghton v. Money*, 2 Ch. 164.

a. This rule was laid down in very clear terms by Tindal, C. J. in *Stanley v. Jones* (a), which seems to be the first of the modern cases at law.

“A bargain by a man who has evidence in his own possession respecting a matter in dispute between third persons and who at the same time professes to have the means of procuring more evidence, to purchase from one of the contending parties, at the price of the evidence which he so possesses or can procure, a share of the sum of money which shall be recovered by means of the production of that very evidence, cannot be enforced in a Court of law.”

(a) Agreement to furnish money or evidence for litigation on terms of sharing property recovered is void.

It is quite immaterial for this purpose whether any litigation is already pending or not, although the *offence* of maintenance is properly maintaining an existing suit, not procuring one to be commenced. It is obvious that the mischief is even greater in the case where a person is instigated by the promise of indemnity in the event of failure to undertake litigation which otherwise he would have not thought of. If a person who is in actual possession of certain definite evidences of title proposes to deliver them to the person whose title they support on the terms of having a certain share of any property that may be recovered by means of these evidences, there being no suit depending, and no stipulation for the commencement of any, this is not unlawful: for litigation is not necessarily contemplated at all, and in any case there is no provision for maintaining any litigation there may be (b). But it is in vain to put the agreement in such a form if these terms are only colourable (c), and the real agreement is to supply evidence generally for the maintenance of an intended suit: the illegal intention may be shown, and the transaction will be held void (b). Still less can the law be evaded by slighter variations in the form or manner of the transaction: for instance, an agreement between solicitor and client that the solicitor shall advance funds for carrying on a suit to recover possession of an estate, and in the event of success shall receive a sum above his regular costs “according to the interest and benefit” acquired by the possession of the estate, is as much void as a bargain for a specific part of the property (d). So where a

Verbal evasions ineffectual.

(a) 7 Bing. 369, 377.

(b) *Sprye v. Porter*, 7 E. & B. 58, 26 L. J. Q. B. 64.

(c) As a matter of fact, it is ex-

tremely difficult to suppose that they could ever be otherwise.

(d) *Earle v. Hopwood*, 9 C. B. N. S. 566, 30 L. J. C. P. 217.

solicitor was to have a percentage of the fund recovered in a suit, it was held to be not the less champerty because he was not himself (and in fact could not be) the solicitor in the suit, but employed another (a).

An agreement by a solicitor with a client simply to charge nothing for costs in a particular action is not champerty (b).

(β) Solicitor in suit can't purchase subject-matter of the suit from his client. This rule anomalous.

β. This rule came to be laid down in a somewhat curious way. In *Wood v. Downes* (c) Lord Eldon set aside a purchase by a solicitor from his client of the *res litigiosa*, partly on the ground of maintenance. But it is to be noted as to this ground that the agreement for sale was in substitution for a previous agreement which clearly amounted, and which the parties had discovered to amount, to maintenance: and the Court appears to have inferred as a fact that it was all one illegal transaction, and the sale merely colourable (d). The other ground, which alone would have been enough, was the presumption of undue influence in such a transaction, arising from the fiduciary relation of solicitor and client (of which we shall speak in a subsequent chapter). The Court of Queen's Bench, however, in *Simpson v. Lamb* (e) followed *Wood v. Downes* as having laid down, as a matter of the "policy of the law," the positive rule above stated. In *Anderson v. Radcliffe* (f), unanimous judgments in both the Q. B. and the Ex. Ch. added the qualification that a conveyance by way of security for past expenses is nevertheless good. The Court of Exchequer Chamber showed a decided opinion that *Simpson v. Lamb* had gone too far, but without positively disapproving it. In *Knight v. Bowyer*, again, Turner, L. J. said "I am aware of no rule of law which prevents an attorney from purchasing what anybody else is at liberty to purchase, subject of course, if he purchases from a client, to the consequences of

(a) *Strange v. Brennan*, 15 Sim. 346, 2 C. P. Cooper (temp. Cottenham) 1. The agreement was made with a solicitor in Ireland, not being a solicitor of the English Court of Chancery, and the fund to be recovered was in England.

(b) *Jennings v. Johnson*, L. R. 8 C. P. 425.

(c) 18 Ves. 120.

(d) Cp. *Sprye v. Porter*, *supra*. In

Wood v. Downes the parties do not seem to have even kept the original and real agreement off the face of the transaction in its ultimate shape. See p. 123. It is to be regretted that the reporter did not preserve the full statement of the facts (p. 122) with which the judgment opened.

(e) 7 E. & B. 84.

(f) E. B. & E. 806, 28 L. J. Q. B. 82, 29 *ib.* 128.

that relation" (a). But the case before the Court was not the purchase by a solicitor from his client of the subject-matter of a suit *in which he was solicitor*; *Simpson v. Lamb*, therefore, was only treated as distinguishable (a). The case must at present be considered a subsisting authority, but anomalous and not likely to be at all extended (b).

γ. As to the purchase of things in litigation in general, the authorities cannot all be reconciled in detail. But the distinction which runs through them all is to this effect. The question in every case is whether the real object be to acquire an interest in property for the purchaser, or merely to speculate in litigation on the account either of the vendor and purchaser jointly or of the purchaser alone. It is not unlawful to purchase an interest in property though adverse claims exist which make litigation necessary for realizing that interest: but it is unlawful to purchase an interest merely for the purpose of litigation. In other words, the sale of an interest to which a right to sue is incident is good (c); but the sale of a mere right to sue is bad (d).

A man who has conveyed property by a deed voidable in equity retains an interest not only transmissible by descent or devise, but disposable *inter vivos* without such disposition being champerty. But "the right to complain of a fraud is not a marketable commodity," and an agreement whose real object is the acquisition of such a right cannot be enforced (e). In like manner, a creditor of a company may well assign his debt, but he cannot sell as incident to it the right to proceed with a winding-up petition (f).

The payment of the price being made contingent on the recovery of the property is probably under any circumstances a sufficient, but is by no means a necessary, condition of the Court being satisfied that the real object is to traffic in litigation. If the purchase is made while a suit is actually pending, the cir-

(a) 2 De G. & J. at p. 445.

(b) Cp. however the Austrian Civil Code, which makes such agreements void (§ 879).

(c) *Dickinson v. Burrell*, 1 Eq. 337, 342.

(d) *Ib.*; *Prosser v. Edmonds*, 1 Y. & C. Ex. 481 (the main part of Lord

Abinger's judgment is extracted in a note to Story, Eq. Jur. § 1040h).

(e) *Prosser v. Edmonds*; *De Hoghton v. Money*, 2 Ch. 164, 169. Cp. *Hill v. Boyle*, 4 Eq. 260.

(f) *Paris Skating Rink Co. (C. A.)* Ch. D. 959.

(γ) Purchase of subject-matter of litigation not in itself unlawful.

But is unlawful if the real intention is to acquire a mere right to sue.

cumstance of the purchaser indemnifying the vendor against costs may be material, but is not alone enough to show that the bargain is in truth for maintenance (a). But the only view which on the whole seems tenable is that it is a question of the real intention to be collected from the facts of each case, for arriving at which few or no positive rules can be laid down.

There is no champerty in an agreement to enable the *bona fide* purchaser of an estate to recover for rent due or injuries done to it previously to the purchase (b).

Purchase of shares in company with intention to sue company or directors at one's own risk not maintenance.

It has been decided in several modern cases that the purchase of shares in a company for the purpose of instituting a suit at one's own risk to restrain the governing body of the company from acts unwarranted by its constitution cannot be impeached as savouring of maintenance (c). It is worth while to note that it was recognized as long ago as 21 Ed. 3 that a purchase of property pending a suit affecting the title to it is not of itself champerty: "If pending a real action a stranger purchases the land of tenant in fee for good consideration and not to maintain the plea, this is no champerty" (d).

Stat. 32 H. 8, c. 9. None shall buy, sell, or bargain for any right in lands unless the seller hath been in possession or taken the profits for one year.

The statute 32 H. 8, c. 9, "Against maintenance and embracery, buying of titles, &c.," deserves special mention. After reciting the mischiefs of "maintenance embracery champerty subornation of witnesses sinister labour buying of titles and pretended rights of persons not being in possession," and confirming all existing statutes against maintenance, it enacts that:

"No person or persons, of what estate degree or condition so ever he or they be, shall from henceforth bargain buy or sell, or by any ways or means obtain get or have, any pretended rights or titles, or take promise grant or covenant to have any right or title of any person or persons in or to any manors lands tenements or hereditaments, but if such person or persons which shall so bargain sell give grant covenant or promise the same their antecessors or they by

(a) *Harrington v. Long*, 2 M. & K. 590, as corrected by *Knight v. Bowyer*, *supra*, and see *Hunter v. Daniel*, 4 Ha. at p. 430. But the true ground of the case seems the same as in *Prosser v. Edmonds* and *De Hoghton v. Money*, namely that the real object was to give the purchaser a *locus standi* to set aside a deed for fraud.

(b) Per Cur. (Ex. Ch.), *Williams v. Protheroe*, 5 Bing. 309, 314.

(c) See *Bloxam v. Metrop. Ry. Co.* 8 Ch. at p. 353. *Supra*, p. 108.

(d) 2 Ro. Ab. 113 B.; Y. B. 21 E. 3. 10, pl. 33 [cited as 52 in Rolle]; but in 50 Ass. 323, pl. 3, the general opinion of the Serjeants is *contra*.

whom he or they claim the same have been in possession of the same or of the reversion or remainder thereof or taken the rents or profits thereof by the space of one whole year next before the said bargain covenant grant or promise made"—

on pain of forfeiture of the whole value of the lands (s. 2), **Penalty and saving.** saving the right of persons in lawful possession to buy in adverse claims (s. 4). There is no express saving of grants or leases by persons in actual possession who have been so for less than a year: but either the condition as to time applies only to receipt of rents or profits without actual possession, or at all events the intention not to touch the acts of owners in possession is obvious (a).

This, like the other statutes against maintenance and cham- **Dealings held within the statute. Agreement to recover and divide property.** perty, is said to be in affirmance of the common law (a). It "is formed on the view that possession should remain undisturbed. Dealings with property by a person out of possession tend to disturb the actual possession to the injury of the public at large" (b). It is immaterial whether the vendor out of possession has in truth a good title or not (a). An agreement between two persons out of possession of lands, and both claiming title in them, to recover and share the lands, is contrary to the policy of this statute, if not champerty at common law: therefore where co-plaintiffs had in fact conflicting interests, and it was sought to avoid the resulting difficulty as to the frame of the suit by stating an agreement to divide the property in suit between them, this device (which now would in any case be disallowed on more general grounds) (c) was unavailing; for such an agreement, had it really existed, would have been unlawful, and would have subjected the parties to the penalties of the statute (d).

Where after the death of a lessee a stranger had entered, and remained many years in possession, a sale of the term by the ad- **Sale of term by administrator out of possession.** ministrator of the lessee was held void as contrary to the statute, although in terms it only forbids sales of pretended rights

(a) By Mountague, C. J. *Partridge v. Strange*, Plowd. 88, cited in *Doe d. Williams v. Evans*, 1 C. B. 717; *ib.* 89.

(b) Per Lord Redesdale, *Cholmondeley v. Clinton*, 4 Bligh, at p. 75.

(c) See *Cooke v. Cooke*, 4 D. J. S. 704; *Pryse v. Pryse*, 15 Eq. 86.

(d) *Cholmondeley v. Clinton*, 4 Bligh 1, 43, 82, per Lord Eldon and Lord Redesdale.

Secus sale
of non-
litigious
expect-
tancy.

&c. under penalties, without expressly making them void (a). But the sale of a contingent right or a mere expectancy, not being in the nature of a claim adverse to any existing possession, is not forbidden. The sale of a man's possible interest as the devisee of a living owner, on the terms that he shall return the purchase-money if he does not become the devisee, is not bad either at common law as creating an unlawful interest in the present owner's death, or as a bargain for a pretended title under the statute (b). By the civil law, however, such contracts are regarded as *contra bonos mores*. "Huiusmodi pactiones odiosae videntur et plenae tristissimi et periculosi eventus," we read in a rescript of Justinian on an agreement between expectant co-heirs as to the disposal of the inheritance. The rescript goes on, quite in the spirit of our own statute, to forbid in general terms all dealings "in alienis rebus contra domini voluntatem" (C. 2. 3. *de pactis*, 30) (c).

Proceed-
ings in
lunacy not
within the
rules
against
champ-
erty.

Proceedings in lunacy seem not to be within the general rules as to champerty, as they are not analogous to ordinary litigation, and their object is the protection of the person and property of the lunatic, which is in itself to be encouraged; and "this object would in many cases be impeded rather than promoted by holding that all agreements relative to the costs of the proceedings or the ultimate division of the property were void" (d).

Mainte-
nance in
general.

As to maintenance in general, maintenance in the strict and proper sense is understood to mean only the maintenance of an existing suit, not procuring the commencement of a new one. But the distinction is in practice immaterial even in the criminal law (e). It is of more importance that a transaction cannot be void for champerty or maintenance unless it be "something

(a) *Doe d. Williams v. Evans*, 1 C. B. 717, 14 L. J. C. P. 237. Cp. above as to the construction of prohibitory statutes in general, p. 260.

(b) *Cook v. Field*, 15 Q. B. 460, 19 L. J. Q. B. 441.

(c) By the French Code Civil, art. 1600 (followed by the Italian Code, art. 1460). "On ne peut vendre la succession d'une personne vivante, même de son consentement:" cp. 791, 1130. The Austrian Code (§ 879) also expressly forbids the alienation

of an expected inheritance or legacy. In Roman law the rule that the inheritance of a living person could not be sold is put only on the technical ground "quia in rerum natura non sit quod venierit" (D. 18. 4. de hered. vel actione vendita, 1, and see *cod. tit.* 7-11.)

(d) *Persse v. Persse*, 7 Cl. & F. 279, 316, per Lord Cottenham.

(e) See *Wood v. Downes*, 18 Ves. at p. 125.

against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary" (a). Therefore, for example, a transaction cannot be bad for maintenance whose object is to enable a principal or other person really interested to assert his rights in his own name (a). Nor is it maintenance for several persons to agree to defend a suit in the result of which they have, or reasonably believe they have a common interest (b). But a bargain to have a share of property to be recovered in a suit in consideration of maintaining the suit by the supply of money and evidence is not saved from being champerty by the party's having a mere collateral interest in the result of the suit (c).

Lineal kinship in the first degree or apparent heirship, and to a certain extent, it seems, any degree of kindred or affinity, or the relation of master and servant, may justify acts which as between strangers would be maintenance : but blood relationship will not justify champerty (d).

c. As to matters touching legal duties of individuals in the performance of which the public have an interest.

Certain kinds of agreements are or have been considered unlawful and void as providing for or tending to the omission of duties which are indeed duties towards individuals, but such that their performance is of public importance. To this head must be referred the rule of law that a father cannot by contract deprive himself of the right to the custody of his children (e) or of his discretion as to their education. He "cannot bind himself conclusively by contract to exercise in all events in a

Certain relations will justify maintenance but not champerty.

c. Public policy as to legal duties of individuals.

Agreements as to custody or education of children.

(a) *Fischer v. Kamala Naicker*, 8 Moo. Ind. App. 170, 187. This is not necessarily applicable in England, being said with reference to the law of British India, where the English laws against maintenance and champerty are not specifically in force : see *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, 2 App. Ca. 186, 207-9. But it fairly represents the principles on which English judges have acted in the modern cases. The result of the Indian case last mentioned seems to be that in

British India the Courts are free to adopt the doctrine of champerty, so far as they think it reasonable, as part of the general judicial scheme of public policy.

(b) *Findon v. Parker*, 11 M. & W. 675. Cp. 2 Ro. Ab. 115 G.

(c) *Hutley v. Hutley*, L. R. 8 Q. B. 112.

(d) *Hutley v. Hutley*, L. R. 8 Q. B. 112. See 2 Ro. Ab. 115-116.

(e) *Re Andrews*, L. R. 8 Q. B. 153, and authorities there collected.

particular way rights which the law gives him for the benefit of his children and not for his own." And an agreement to that effect—such as an agreement made before marriage between a husband and wife of different religions that boys shall be educated in the religion of the father, and girls in the religion of the mother—cannot be enforced as a contract either at law or in equity (*a*).

After the father's death Courts of Equity have a certain discretion. The children are indeed to be brought up in his religion, unless it is distinctly shown by special circumstances that it would be contrary to the infant's benefit (*b*). When such circumstances are in question, however, the Court may inquire "whether the father has so acted that he ought to be held to have waived or abandoned his right to have his children educated in his own religion"; and in determining this the existence of such an agreement as above mentioned is material (*c*). The father's conduct in giving up the maintenance, control, or education of his children to others may not only leave the Court free to make after his death such provision as seems in itself best; it may preclude him even from asserting his rights in his lifetime (*d*).

In separation
deeds.

Clauses in separation deeds or agreements for separation, purporting to bind the father to give up the general custody of his children or some of them, have for the like reasons been held void; and specific performance of an agreement to execute a separation deed containing such clauses has been refused (*e*). In one case, however, such a contract can be enforced; namely where there has been such misconduct on the father's part that the Court would have interfered to take the custody of the children from him in the exercise of its appropriate jurisdiction and on grounds independent of contract. The general rule is only that the custody of children cannot be made a mere matter of bargain, not that the husband can in no circumstances bind himself not to set up his paternal rights (*f*).

(*a*) *Andrews v. Salt*, 8 Ch. 622, 636.

(*b*) *Hawksworth v. Hawksworth*, 6, Ch. 539.

(*c*) *Andrews v. Salt*, 8 Ch. at p. 637.

(*d*) *Lyons v. Blenkin*, Jac. 245, 255, 263.

(*e*) *Vansittart v. Vansittart*, 2 De

G. & J. 249, 259. As to the validity of partial restrictions of the husband's right, *Hamilton v. Hector*, 6 Ch. 701, 13 Eq. 511.

(*f*) *Swift v. Swift*, 4 D. F. J. 710, 714; and see the remarks in 6 Ch. 705, 13 Eq. 520.

The law on this point is now modified by the Act 36 Vict. 86 Vict.
c. 12, which enacts (s. 2) that c. 12, s. 2.

"No agreement contained in any separation deed between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto."

The objections formerly entertained (as we have seen) first On this against separation deeds in general, and afterwards down to quite ground, in recent times against giving full effect to them in Courts of part, the Equity, were based in part upon the same sort of grounds: and doctrines as to separation deeds in general; so are the reasons for which agreements providing for a future separation have always been held invalid. For not the parties alone, but society at large is interested in the observance of the duties incident to the marriage contract, as a matter of public example and general welfare.

Considerations of the same kind enter into the policy of the and as to law with respect to the sale of offices, also spoken of above. sale of offices. Such transactions clearly involve the abandonment or evasion of distinct legal duties.

On similar grounds, again, seamen's wages, or any remuneration in lieu of such wages, cannot be the subject of insurance at Insurance of seamen's wages. common law (a). The reason of this is said to be "that if the title to wages did not depend upon the earning of freight by the performance of the voyage, seamen would want one great stimulus to exertion in times of difficulty and danger" (b). This reason however is removed in England by the Merchant Shipping Act 1854, (17 & 18 Vict. c. 104, s. 183) which makes the right to wages independent of freight being earned. The question has not yet presented itself for decision whether the rule founded upon it is to be considered as removed also.

d. As to agreements unduly limiting the freedom of individual action. d. Public policy as to freedom of individual action.

There are certain points in which it is considered that the

(a) *Webster v. De Tastet*, 7 T. R. 157. (b) *Kent*, Comm. 3. 269.

choice and free action of individuals should be as unfettered as possible. As a rule a man may bind himself to do or omit, or to procure another to do or omit, anything which the law does not forbid to be done or left undone. The matters as to which this power is specially limited on grounds of general convenience are :—

- (a) Marriage.
- (β) Testamentary dispositions.
- (γ) Trade.

(a) Marriage.
“Marriage
brokage”
agreements
void.

(a) Marriage is a thing in itself encouraged by the law ; the marriage contract is moreover that which of all others should be the result of full and free consent. Certain agreements are therefore treated as against public policy either for tending to impede this freedom of consent and introduce unfit and extraneous motives into the contracting of particular marriages, or for tending to hinder marriage in general. The first class are the agreements to procure or negotiate marriages for reward which are known as marriage brokage contracts. All such agreements are void (a), and services rendered without request in procuring or forwarding a marriage (at all events a clandestine or improper one) are not merely *no* consideration, but an *illegal* consideration, for a subsequent promise of reward ; which promise, even if under seal, is therefore void (b). The law is said to be comparatively modern on this head : however that may be, we venture to think that for practical purposes and in the present state of society it has already become needless to say much of it (c).

The Austrian Code agrees with our law (§ 879).

Agreement in
general
restraint
of marriage
void.

We pass on to the second class, agreements “in restraint of marriage” as they are called. An agreement by a bachelor or spinster not to marry at all is clearly void (d); so, it seems, would be a bare agreement not to marry within a particular time (e).

(a) *E.g. Cole v. Gibson*, 1 Ves. Sr. 503. See Story, Eq. Jur. §§ 260 sqq.

(b) *Williamson v. Gihon*, 2 Sch. & L. 357.

(c) In the Roman law these contracts were good apart from special legislation : they were limited as to amount (though with an expression of general disapproval) by a con-

stitution preserved only in a Greek epitome: C. 5. 1. de sponsalibus, &c. 6.

(d) *Lowe v. Peers*, Wilmot 371 : where it is said that it is a contract to omit a moral duty, and “tends to depopulation, the greatest of all political sins.”

(e) *Hartley v. Rice*, 10 East 22 (a wager).

In *Lowe v. Peers* (a) a covenant not to marry any person other than the covenantee was held void. A promise to marry nobody but A. B. cannot be construed as a promise to marry A. B. and is thus in mere restraint of marriage: and even if it could, it was thought doubtful whether an unilateral covenant to marry A. B. would be valid, A. B. not being bound by any reciprocal promise (b). Lord Mansfield threw out the opinion (not without followers in our own time) (c), that even the ordinary contract by mutual promises of marriage is not free from mischievous consequences. The decision was affirmed in the Exchequer Chamber, where it was observed that:—

“Both ladies and gentlemen . . . frequently are induced to promise not to marry any other persons but the objects of their present passion; and if the law should not rescind such engagements, they would become prisoners for life at the will of most inexorable jailors—disappointed lovers” (d).

We do not know of any express decision, but it may be gathered from the analogy of the cases on *conditions* that a contract not to marry some particular person, or any person of some particular class, would be good unless the real intention appeared to be to restrain marriage altogether; and that a contract by a widow or widower not to marry at all would probably be good (e). *As to conditions in restraint of marriage.* The learning of conditions in restraint of marriage (which always or almost always occur in wills) does not properly fall within our subject. Nevertheless it may be worth while to give a summary statement of what is believed to be the result of the authorities.

Conditions in restraint of marriage:—

If *precedent*, are with trifling exceptions (if any) valid as to both real and personal estate.

If *subsequent*,—

General restraint. Good, it seems, as to real estate (see 1 Atk. 380, n.); at any rate if the disposition, in whatever form, can be

(a) 4 Burr. 2225, in Ex. Ch. Wilm. 364.

(b) But of this *qu.*: for a refusal by A. B. to marry on request within a reasonable time would surely discharge the promisor on general principles.

(c) 4 Burr. 2230; per Martin, B. *Hall v. Wright*, E. B. & E. at p. 788,

29 L. J. Q. B. at p. 49. A bill to abolish the action for breach of promise of marriage has been introduced in the present session of Parliament.

(d) Wilm. 371.

(e) See *Scott v. Tyler*, in 2 Wh. & T. L. C. and notes.

taken to show an intention not of discouraging marriage but of making a provision until marriage : *Jones v. Jones*, 1 Q. B. D. 279.

Bad as to personal estate (a) or mixed fund (or a fund arising only from sale of realty, *semble*) : *Bellairs v. Bellairs*, 18 Eq. 510—and this whether there is a gift over or not.

Particular restraint. Good as to real estate (1 Ro. Ab. 418 X., pl. 6) ; and good as to personal estate if there is a gift over, otherwise not.

These rules do not apply to conditions restraining the second marriage either of a woman : *Newton v. Marsden*, 2 J. & H. 356, or of a man : *Allen v. Jackson*, 1 Ch. D. 399, revg. S. C. 19 Eq. 631.

Nor to *conditional limitations* (as a gift until marriage) in a disposition of either real or personal estate.

The Master of the Rolls observed in a late case (b) that the rule against conditions in restraint of marriage, at first adopted from the ecclesiastical courts on grounds of public policy, has been so modified in its application by courts of equity that it can now be treated only as an arbitrary rule of construction. A glance at the statement above will show, if we may be allowed to say so, the complete justness of the remark. By the law of France promises of marriage are invalid, “*comme portant atteinte à la liberté illimitée qui doit exister dans les mariages*” : nevertheless if actual special damage (*préjudice*) can be shown to have resulted from non-fulfilment of the promise, the amount of it can be recovered, it would seem as due *ex delicto* rather than *ex contractu* (c).

(β) Agree-
ment to
influence
testator.

β. An agreement to use influence with a testator in favour of a particular person or object is void (d). On the other hand, it is well established that a man may validly bind himself or his estate by a contract to make any particular disposition (if in itself lawful) by his own will (e). Such contracts were not recognized by Roman law (f), and even a gift *inter vivos* of all the donor's after-acquired property would have been bad as an evasion of the rule : but in the modern civil law of Germany, as with us, a contract of this sort (*Erbvertrag*) is good (g).

(a) For a general account of the doctrine as to personalty see *Morley v. Rennoldson*, 2 Ha. 570.

(b) *Bellairs v. Bellairs*, 18 Eq. 510, 516.

(c) See notes in Sirey & Gilbert on Code Civ. art. 1142. Nos. 11-19.

(d) *Debenham v. Ox*, 1 Ves. Sr. 276.

(e) *De Beil v. Thomson*, 3 Beav.

469, s.c. nom. *Hammersley v. Baron de Beil*, 12 CL & F. 45 ; *Brookman's* tr. 5 Ch. 182.

(f) *Stipulatio hoc modo concepta: Si heredem me non fecerim, tantum dare spondes? inutilis est, quia contra bonos mores est haec stipulatio.* D. 45. 1. de v. o. 61.

(g) Savigny, Syst. 4. 142-5.

γ. Agreements in restraint of trade. It would be impossible to give an adequate account of this subject on the plan and within the limits of this book ; and it is satisfactory to feel that any attempt to do so is rendered needless by the place already given to it in a work of no small authority (a). We shall here only give the principles and the short results of the authorities, with some mention of recent decisions.

The general rule is that a man ought not to be allowed to restrain himself by contract from exercising any lawful craft or business at his own discretion and in his own way. Partial restrictions, however, are admitted to the extent and for the reasons to be presently stated. Thus an agreement between several master manufacturers to regulate their wages and hours of work, the suspending of work partially or altogether, and the discipline and management of their establishments, by the decision of a majority of their number, is in general restraint of trade as depriving each one of them of the control of his own business, and is therefore not enforceable (b). It makes no difference that the object of the combination is alleged to be mutual defence against a similar combination of workmen. The case decides on the whole that neither an agreement for a strike nor an agreement for a lock-out is enforceable by law. The Court of Exchequer Chamber thus expressed the general principle in the course of their judgment :—

“ Prima facie it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it [his trade] on according to his own discretion and choice. If the law has in any matter [*qu. manner?*] regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion” (c).

But it is not an unlawful restraint of trade for a certain number of proprietors or manufacturers to agree not to compete

(a) See notes to *Mitchel v. Reynolds*, 1 Sm. L. C. 406.

(b) *Hilton v. Eckersley*, 6 E. & B. 47, in Exch. Ch. *ib.* 66 ; 24 L. J. Q. B. 353, 25 *ib.* 199. The dicta there leave it doubtful if the agreement would be a criminal offence at common law. By the Trade Union Act, 1871, 34 & 35 Vict. c. 31, ss. 2-5,

agreements of this kind between workmen are protected against the criminal law, though not enforceable. It would be difficult to maintain that the like agreements between masters, though not named, are not within the meaning of the Act.

(c) 6 E. & B. at p. 74-5.

with one another for a public contract, but to make what is really a joint tender in the name of one of them (a).

Reasons
for not
allowing
general
restraint.

The reasons against allowing agreements in unlimited restraint of trade are set forth at large in the leading case of *Mitchel v. Reynolds* (b), and at a more recent date (1837) were put somewhat more concisely by the Supreme Court of Massachusetts, who held a bond void which was conditioned that the obligor should never carry on or be concerned in iron founding :—

“ 1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons for the sake of gain to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression.

2. They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves.

3. They discourage industry and enterprise, and diminish the products of ingenuity and skill.

4. They prevent competition and enhance prices.

5. They expose the public to all the evils of monopoly ” (c).

The second and fifth of these reasons appear to be the strongest and really efficient ones in themselves and to have been so as a matter of history. The first might be applied to almost any bad bargain, and the third and fourth, so far as really admissible, are only partial statements of the fifth.

For allow-
ing partial
restraint.

The admission of limited restraints is commonly spoken of as an exception to the general policy of the law. But it seems better to regard it rather as another branch of it. Public policy requires on the one hand that a man shall not by contract deprive himself or the state of his labour skill or talent ; and on the other hand, that he shall be able to preclude himself from competing with particular persons so far as necessary to obtain the best price for his business or knowledge, when he chooses to sell it. Restriction which is reasonable for the protection of the parties in such a case is allowed by the very same policy that forbids restrictions generally, and for the like reasons (d).

(a) *Jones v. North*, 19 Eq. 426.
The case seems not free from difficulties on other grounds.

(b) 1 P.Wms. 181, 1 Sm. L. C. 406.

(c) *Alger v. Thacker*, 19 Pick. 51, 54.

(d) *James, V.-C. Leather Cloth Co. v. Lonsont*, 9 Eq. 345, 353.

It has been suggested by a learned American writer that in its origin the doctrine was founded on a much more obvious and immediate inconvenience than can be now assigned as the consequence of allowing these contracts. It dates from the time when a man could not lawfully exercise any trade to which he had not been duly apprenticed and admitted: so that if he covenanted not to exercise his own trade, he practically covenanted to exercise none—in other words not to earn his living at all (*a*). One might even go a step farther: for by the statute 5 Eliz. c. 4 (now wholly repealed by the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86) which consolidated earlier Acts of the same kind, not only the common labourer, but the artificer in any one of various trades, was compellable to serve in his trade if unmarried or under the age of 30 years, and not a forty-shilling freeholder or copyholder or “worth of his own goods the clear value of ten pounds.” An agreement by a person within the statute not to exercise his own trade might therefore be deemed, at any rate if unlimited, to amount to an agreement to omit a legal duty—which of course is positively illegal. But it must not be forgotten that absolute freedom of trade is positively asserted as the normal state of things always assumed and upheld by the common law; wherefore it may be doubted if any artificial explanation is wanted. It was resolved in the *Ipswich Tailors’* case (*b*) that at the common law no man could be prohibited from working in *any* lawful trade: and it was said that

Questions as to historical origin of the doctrine.

Absolute freedom of trade asserted by Coke as old common law.

“The stat. of 5 Eliz. 4, which prohibits every person from using or exercising any craft mystery or occupation, unless he has been an apprentice by the space of seven years, was not enacted only to the intent that workmen should be skilful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades: and thereby it appears, that without an act of parliament (*c*) none can be prohibited from working in any lawful trade.”

And certain ordinances, by which the tailors of Ipswich forbade any one to exercise the trade of a tailor there until he had presented himself to the master and wardens and satisfied them of his qualification, were held void, inasmuch as

(*a*) Parsons on Contracts, 2. 255.
(*b*) 11 Co. Rep. 53*a*, 54*b*.

(*c*) So again in the case of *Monopolies*, *ib.* 87*b*.

"Ordinances for the good order and government of men of trades and mysteries are good, but not to restrain any one in his lawful mystery" (a).

Partial
restraint
held good
in 2 H. 5.

It seems certain that *partial* restraints were recognized as valid at an early time. This appears from the Dyer's case in 2 H. 5 (Pasch., fo. 5, pl. 26), which has been sometimes misunderstood. The action was debt on a bond conditioned that the defendant should not use his craft of a dyer in the same town with the plaintiff for half a year: a contract which would now be clearly good if made upon valuable consideration. The defence was that the condition had been performed. To this Hull, J. said: "To my mind you might have demurred to him that the obligation is void, because the condition is against the Common Law; and *per Dieu* (b) if the plaintiff were here he should go to prison till he had made fine to the King." But it does not appear that this dictum met with assent at the time, and the parties proceeded to issue on the question whether the condition had in fact been performed or not. Hull's opinion however was approved by all the Justices of the C. P. in a blacksmith's case in 29 Eliz. of which we have two reports (c). It does not appear in either case what was the real occasion or consideration of the contract; very possibly the Courts thought it out of the question, when they had an instrument under seal before them, to listen to or look at anything outside the contents of the deed itself. For aught the reports show it may well have been, and not improbably was, the ordinary transaction of a sale of good-will or the like in both the dyer's and the blacksmith's case.

Contra in
29 Eliz.,
semble.

Contracts
in partial
restraint
in modern
times.

The contracts in partial restraint of trade which occur in modern books are chiefly of the following kinds:

Agreements by the seller of a business not to compete with the buyer.

Agreements by a partner or retiring partner not to compete with the firm.

Agreements by a servant or agent not to compete with his master or employer after his time of service or employment is

(a) Cp. the case of the Cloth-workers' Co. mentioned *ib.* 86b.

(b) This expletive is not unique in the Year Books: nor is it, at that date, altogether conclusive (as

modern writers assume) to show that the speaker had lost his temper.

(c) Moore 242, pl. 379, 2 Leo. 210.

over. It by no means follows, however, that an agreement in partial restraint of trade must fall within one of these descriptions in order to be valid.

The rule established by the modern decisions is in effect as follows :

An agreement not to carry on a particular trade or business is a valid contract if it satisfies the following conditions : Rules as to their validity.

(i) It must be founded on a valuable consideration.

(ii) It must not be unlimited as to space.

(iii) And the restriction must not otherwise go beyond what in the judgment of the Court is reasonably necessary for the protection of the other party, regard being had to the nature of the trade or business (a).

It was at one time thought that the consideration must be not only valuable but adequate : but it is now clearly settled that this class of contracts forms no exception to the general rule. Here as elsewhere the Court will not inquire into the adequacy of the consideration. It is enough if a legal consideration of any value, however small, be shown (b). On the other hand the necessity of showing some consideration is not dispensed with, or the burden of proof shifted, by the contract being under seal.

It has been doubted in one recent case whether the condition as to limits of space (ii) is absolute, or liable to qualification by special circumstances—in fact only a presumption which generally holds good in determining what is on the whole a reasonable restriction (iii) (c). But in this case the restriction, which extended to “any part of Europe,” was incident in substance to a contract not to communicate the means or processes of the particular manufacture. It is settled that a contract not to divulge a trade secret need not be qualified at all : and if a man is entitled to restrain himself from communicating the process he must be entitled to make that contract effectual—if indeed it be more than expressing its full meaning—by restraining himself to the same extent from carrying on a manufacture which would involve

Of the rule as to limits of space in particular.

(a) See per Selwyn, *L. J. Catt v. Tourle*, 4 Ch. 659 ; and *Leather Cloth Co. v. Lonsont*, 9 Eq. 349, *Allsopp v. Wheatcroft*, 15 Eq. 61 (arg.)

(b) *Hitchcock v. Coker*, 6 Ad. & E.

438 (Ex. Ch.) which also settles that a limit in time is not indispensable ; *Gravelly v. Barnard*, 18 Eq. 518.

(c) *Leather Cloth Co. v. Lonsont*, 9 Eq. 345, 353.

the communication of the process (*a*). A case not unlike this was *Jones v. Lees* (*b*), where the licensee of a patent for certain machinery bound himself during the term of the licence (without any express limit as to space, but it seems to have been taken as confined by the context to England) not to make or sell any machines of the specified kind not fitted with the patent: here the restriction was held reasonable, as being only co-extensive with the privilege. Again it is the constant practice for a partner to bind himself absolutely not to compete with the firm during the partnership: and so may a servant in a trade bind himself absolutely not to compete with his master during the service, however long that may last (*c*). On the whole therefore the general rule seems to stand, but subject to definite exceptions which may be given thus:

It does not apply to contracts of partnership or service, or for the preservation of a trade secret. (iv) An agreement not to carry on a particular business may be good though not limited as to space, if incident to a contract of partnership or service in the same business and limited to the duration of the partnership or service (and to the purpose of preventing competition with the firm or employer) (*d*), or if necessarily incident to a contract by the vendor of a business not to divulge the means or processes of that business to any person other than the purchaser.

General reasonableness of restriction in particular cases. At all events the restriction must in the particular case be reasonable, and this is a question not of fact but of law. What amounts of restriction have been held reasonable or not for the circumstances of different kinds of business is best seen in the tabular statement of cases (down to 1854) subjoined to the report of *Avery v. Langford* (*e*). It may be convenient to add the later decisions in the same form.

(*a*) 9 Eq. 354-5, cp. remarks in *Allsopp v. Wheatcroft*, 15 Eq. 64-5.

(*b*) 1 H. & N. 189, 26 L. J. Ex. 9.

(*c*) *Wallis v. Day*, 2 M. & W. 273.

(*d*) It is perhaps needless to express this qualification, as the terms of the agreement itself, if not manifestly unreasonable, would be taken as the measure of what the parties thought necessary for that purpose.

(*e*) Kay 667. Note that *Wallis v. Day*, 2 M. & W. 273, did not decide that a covenant unlimited in space was enforceable, but only that it did not prevent an independent covenant to pay money contained in the same deed from being enforced: it might well have been held valid, however, as being incidental to a contract of service.

Restriction held Reasonable.

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.	Table of recent cases (since <i>Avery v. Langford</i> .)
1855. <i>Dendy v. Henderson</i> (a), 11 Ex. 194, 24 L. J. Ex. 324.	Solicitor.	21 years from determination of defendant's employment as managing clerk to plaintiff.	21 miles from parish of Tormoham, Torquay.	
1856. <i>Jones v. Lees</i> (b), 1 H. & N. 189, 26 L. J. Ex. 9.	Manufacture or sale of slubbing and roving frames not fitted with plaintiff's patent invention.	Continuance of defendant's licence from plaintiff to use and sell the patented invention.	England! (not limited in terms).	
1857. <i>Benwell v. Inns</i> , 24 Beav. 307.	Cowkeeper, milkman, milk seller, or milk carrier.	Continuance of defendant's service with plaintiff and 24 months after.	Three miles from Charles Street, Grosvenor Sq.	
1859. <i>Mumford v. Gething</i> , 7 C. B. N. S. 305, 29 L. J. C. P. 105.	Travelling in lace trade for any house other than plaintiff's.	Unlimited.	"Any part of the same ground," i.e. the district in which defendant was employed as traveller for plaintiffs.	
1862. <i>Harms v. Parsons</i> , 32 Beav. 328.	Horse-hair manufacturer.	Unlimited.	200 miles from Birmingham.	
1863. <i>Clarkson v. Edge</i> , 33 Beav. 227.	Gas meter manufacturer and gas engineer.	Ten years.	20 miles from Great Peter St., Westminster.	
1869. <i>Catt v. Tourle</i> , 4 Ch. 654.	Covenant by purchaser of land that vendor should have exclusive right of supplying beer.	Unlimited.	Any public house erected on the land.	
1869. <i>Leather Cloth Co. v. Lonsont</i> (c), 9 Eq. 345.	Manufacture or sale of patent leather cloth.	Unlimited.	Europe; but to be construed as = Great Britain or United Kingdom, <i>semble</i> , see p. 351.	
1874. <i>Gravely v. Barnard</i> , 18 Eq. 518.	Surgeon.	So long as plaintiff or his assigns should carry on business.	Parish of Newick & 10 miles round, excepting the town of Lewes.	
1875. <i>Printing & Numerical Registering Co. v. Sampson</i> , 19 Eq. 462.	Agreement by vendor of patent to assign to purchaser all after-acquired patent rights of like nature.	Lifetime of vendors.	Europe.	
1875. <i>May v. O'Neill</i> , W. N. 179.	Solicitor (covenant in clerk's articles).	Unlimited.	London, Middlesex and Essex; and unlimited as to acting for clients of plaintiff's firm, or any one who had been such client during the term of the articles.	

(a) Whether an agreement not to *reside* at a given place as well as not to carry on business be good, *quære*.

(b) See last page.

(c) See p. 313.

Restriction held Unreasonable.

Name and Date of Case.	Trade or Business.	Extent of Restriction in Time.	Extent of Restriction in Space.
1872. <i>Allsopp v. Wheatcroft</i> , 15 Eq. 59.	"Shall not directly or indirectly sell, procure orders for the sale, or recommend, or be in any wise concerned or engaged in the sale or recommendation . . . of any Burton ale, &c., or of any ale, &c., brewed at Burton or offered for sale as such" other than ale, &c., brewed by plaintiffs.	During defendant's service with plaintiffs (so far probably good) and two years after.	Unlimited.

Measure-
ment of
distances.

It is now settled, after some little uncertainty, that distances specified in contracts of this kind are to be measured as the crow flies, i.e. in a straight line on the map, neglecting curvature and inequalities of surface. This is only a rule of construction, and the parties may prescribe another measurement if they think fit, such as the nearest mode of access (a).

Contract
to serve
for life not
invalid.

It is clear law that a contract to serve in a particular business for an indefinite time, or even for life, is not void as in restraint of trade or on any other ground of public policy (b). It would not be competent to the parties, however, to attach servile incidents to the contract, such as unlimited rights of personal control and correction, or over the servant's property (c). By the French law indefinite contracts of service are not allowed (d). It is undisputed that an agreement by A. to work for nobody but B. in A.'s particular trade, even for a limited time, would be void in the absence of a reciprocal obligation upon B. to employ A. (e). But a promise by B. to employ A. may be

Contract
for ex-
clusive
service
must be
mutual.

(a) *Mouflet v. Cole*, L. R. 7 Ex. 70, in Ex. Ch. 8 Ex. 32.
(b) *Wallis v. Day*, 2 M. & W. 273, 1 Sm. L. C. 377-8. The law of Scotland is apparently the same according to the modern authorities.
(c) See Hargrave's argument in *Sommersett's ca.* 20 St. T. 49, 66.

(d) Cod. Civ. 1780: On ne peut engager ses services qu'à temps, ou pour une entreprise déterminée: so the Italian Code, 1628.
(e) See note (a), next p. and cp. the similar doctrine as to promises of marriage, *supra*.

collected from the whole tenor of the agreement between them, and so make the agreement good, without any express words to that effect (a).

D. The judicial treatment of unlawful agreements in general.

Thus far of the various specific grounds on which agreements are held unlawful. It remains for us to give as briefly as may be the rules which govern our Courts in dealing with them, and which are almost without exception independent of the particular ground of illegality. The general principle, of course, is that an unlawful agreement cannot be enforced. But this alone is insufficient. We still have to settle more fully what is meant by an unlawful agreement. For an agreement is the complex result of distinct elements, and the illegality must attach to one or more of those elements in particular. It is material whether it be found in the promise, the consideration, or the ultimate purpose. Again there are questions of evidence and procedure for which auxiliary rules are needed within the bounds of purely municipal law. Moreover when the jurisdictions within which a contract is made, is to be performed, and is sued upon, do not coincide, it has to be ascertained by what local law the validity of the contract shall be determined (conflict of laws in space): again the law may be changed between the time of making the contract and the time of performance (conflict of laws in time, as it has been called).

D. Rules as to treatment of unlawful agreements in general.

This general division is a rough one, but will serve to guide the arrangement of the following statement.

Unlawfulness of agreement as determined by particular elements.

1. A lawful promise made for a lawful consideration is not invalid only by reason of an unlawful promise being made at the same time and for the same consideration.

1. Independent promises, some lawful and some unlawful: the lawful ones can be enforced.

In *Pigot's* case (b) it was resolved that if some of the covenants of an indenture or of the conditions indorsed upon a bond are against law, and some good and lawful, the covenants or conditions which are against law are void ab initio and the others

(a) *Pilkington v. Scott*, 15 M. & W. 657. Cp. *Hartley v. Cummings*, 5 C. B. 247. (b) 11 Co. Rep. 27 b.

stand good. Accordingly "from Pigot's case, 6 Co. Rep. 26 (a), to the latest authorities it has always been held that when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal and some illegal at common law, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot" (b).

It was formerly supposed that where a deed is void in part by statute it is void altogether: but this is not so. "Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good" (c).

2. Unlawful consideration or part of consideration avoids the whole agreement.

2. If any part of the consideration for a promise or set of promises is unlawful, the whole agreement is void.

"For it is impossible in such case to apportion the weight of each part of the consideration in inducing the promise" (d). In other words, where independent promises are in part lawful and in part unlawful, those which are lawful can be enforced; but where any part of an entire consideration is unlawful, all promises founded upon it are void.

3. Agreement is void whose immediate object is unlawful.

3. When the immediate object of an agreement is unlawful the agreement is void.

This is an elementary proposition, for which it is nevertheless rather difficult to find unexceptionable words. We mean it to cover only those cases where either the agreement could not be performed without doing some act unlawful in itself, or the performance is in itself lawful, but on grounds of public policy is not allowed to be made a matter of contract. The statement is material chiefly for the sake of the contrasted class of cases under the next rule.

4. Where immediate object not unlawful,

4. When the immediate object or consideration of an agreement is not unlawful, but the intention of one or both parties in making it is unlawful, then—

(a) *Sic* in the report. Parts 11, 12, and 13 of Coke's Reports form vol. 6 in the edition of 1826.

(b) *Bank of Australasia v. Breillat*, 6 Moo. P. C. 152, 201.

(c) Per Willes, *J. Pickering v.*

Ilfracombe Ry. Co. L. R. 3 C. P. at p. 250.

(d) Leake on Contracts, 409. *Waite v. Jones*, 1 Bing. N. C. 656, 662.

If the unlawful intention is at the date of the agreement common to both parties, or entertained by one party to the knowledge of the other, the agreement is void.

If the unlawful intention of one party is not known to the other at the date of the agreement, there is a contract voidable at the option of the innocent party if he discovers that intention at any time before the contract is executed.

Here it is necessary to consider what sort of connexion of the subject-matter of the agreement with an unlawful plan or purpose is enough to show an unlawful intention that will vitiate the agreement itself. This is not always easy to determine. In the words of the Supreme Court of the United States:—

“Questions upon illegal contracts have arisen very often both in England and in this country; and no principle is better settled than that no action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law. How far this principle is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy” (a): or perhaps we should rather say it is a question on which any attempt to lay down fixed and exhaustive rules in detail must lead to considerable intricacy: at the date of these remarks however (1826) the law was much less clear on specific points than it is now.

We have in the first place a well marked class of transactions where there is an agreement for the transfer of property or possession for a lawful consideration, but for the purpose of an unlawful use being made of it. All agreements incident to such a transaction are void; and it does not matter whether the unlawful purpose is in fact carried out or not (b). The later authorities show that the agreement is void, not merely if the unlawful use of the subject-matter is part of the bargain, but if the intention of the one party so to use it is known to the other at the time of the agreement (c). Thus money lent to be used in an unlawful manner cannot be recovered (d). It is true that

(a) *Armstrong v. Toler*, 11 Wheat. at p. 272.

(b) *Gas Light & Coke Co. v. Turner*, 5 Bing. N. C. 666, in Ex. Ch. 6 *ib.* 324.

(c) *Pearce v. Brooks*, L. R. 1 Ex. 213.

(d) *Cannan v. Bryce*, 3 B. & Ald. 179.

unlawful intention of both parties, or of one party known to the other, makes agreement void : unlawful intention of one not known at time makes contract voidable at other's option. What constitutes unlawful intention in such cases.

Intention to put property purchased &c. to unlawful use.

money lent to pay bets can be recovered, but that, as we have seen, is because there is nothing unlawful in either making a bet or paying it if lost, though the payment cannot be enforced. If goods are sold by a vendor who knows that the purchaser means to apply them to an illegal or immoral purpose, he cannot recover the price: it is the same of letting goods on hire (*a*). If a building is demised in order to be used in a manner forbidden by a Building Act, the lessor cannot recover on any covenant in the lease (*b*). And in like manner if the lessee of a house which to his knowledge is used by the occupiers for immoral purposes assigns the lease, knowing that the assignee means to continue the same use, he cannot recover on the assignee's covenant to indemnify him against the covenants of the original lease (*c*). It does not matter whether the seller or lessor does or does not expect to be paid out of the fruits of the illegal use of the property (*a*).

Option
of party
innocent
in the first
instance to
avoid the
contract on
discovering
such
intention.

An owner of property who has contracted to sell or let it, but finds afterwards that the other party means to use it for an unlawful purpose, is entitled (if not bound) to rescind the contract; nor is he bound to give his reason at the time of refusing to perform it. He may justify the refusal afterwards by showing the unlawful purpose, though he originally gave no reason at all, or even a different reason (*d*).

But an
executed
transfer of
possession
remains
good.

But a completely executed transfer of property or an interest in property, though made on an unlawful consideration, or, it is conceived, for an unlawful purpose known to both parties, is valid both at law and in equity (*e*), and cannot afterwards be set aside. And an innocent party who discovers the unlawful intention of the other after possession has been delivered under the contract is not entitled to treat the transaction as void and resume possession (*f*).

(*a*) *Pearce v. Brooks*, L. R. 1 Ex. 213.

(*b*) *Gas Light & Coke Co. v. Turner*, 5 Bing. N. C. 666, in Ex. Ch. 6 *ib.* 324.

(*c*) *Smith v. White*, 1 Eq. 626.

(*d*) *Cowan v. Milbourn*, L. R. 2 Ex. 230, see per Bramwell, B. *ad fin.*

(*e*) *Ayerst v. Jenkins*, 16 Eq. 257.

(*f*) *Peret v. Hill*, 15 C. B. 207 23 L. J. C. P. 185, where an interest in realty had passed; but *qu.* if the lessor could not have had the lease set aside in equity. As to chattels, *contra* per Martin, B. in *Pearce v. Brooks*, L. R. 1 Ex. 217; but this seems unsupported: see L. R. 4 Q. B. 311, 315.

As with contracts voidable on other grounds, this rule applies, it is conceived, only where an interest in possession has been given by conveyance or delivery. The vendor who had sold goods so as to pass the general property, but without delivery, or the lessor who had executed a demise to take effect at a future day, might rescind the contract and stand remitted to his original possession on learning the unlawful use of the property designed by the purchaser or lessee.

On the same principle an insurance on a ship or goods is void if the voyage covered by the insurance is to the knowledge of the owner unlawful (which may happen by the omission of the statutory requirements enacted for the protection of seamen and passengers, as well as in the case of trading with enemies or the like). "Where the object of an Act of Parliament is to prohibit a voyage, the illegality attaching to the illegal voyage attaches also to the policy covering the voyage," if the illegality be known to the assured. But acts of the master or other persons not known to the owner do not vitiate the policy, though they may be such as to render the voyage illegal (a).

Insurance void where voyage illegal to knowledge of owner.

An agreement may be made void by its connexion with an unlawful purpose, though subsequent to the execution of it.

Agreements connected with but

To have that effect, however, the connexion must be something more than a mere conjunction of circumstances into which the unlawful transaction enters so that without it there would have been no occasion for the agreement. It must amount to a unity of design and purpose such that the agreement is really part and parcel of one entire unlawful scheme. This is well shown by some cases decided in the Supreme Court of the United States,

subsequent to an unlawful transaction.

Such agreement not void unless an

(a) *Wilson v. Rankin*, L. R. 1 Q. B. 163 (Ex. Ch.); *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581, 585, per Quain, J., and authorities there referred to. Cp. further, on the general head of agreements made with an unlawful purpose, *Hanauer v. Doane*, 12 Wallace (Sup. Ct. U. S.) 342: in *Sprott v. U. S.* 20 *ib.* 459, it was held that a buyer of cotton from the Confederate Government, knowing that the

purchase-money would be applied in support of the rebellion, could not be recognized by the U. S. courts as owner of the cotton: *diss.* Field, J. on the grounds (which seem right) that it was a question not of contract but of ownership, and that in deciding on title to personal property the *de facto* government existing at the time and place of the transaction must be regarded.

integral
part of
unlawful
design.
Cases in
Supreme
Court, U.S.
Armstrong
v. Toler,
&c.

and spreading over a considerable time. They are the more worth special notice as they are unlike anything in our own books. In *Armstrong v. Toler* (a) the point, as put by the Court in a slightly simplified form, was this: "A. during a war contrives a plan for importing goods on his own account from the country of the enemy, and goods are sent to B. by the same vessel. A. at the request of B. becomes surety for the payment of the duties [in fact a commuted payment in lieu of confiscation of the goods themselves] which accrue on the goods of B., and is compelled to pay them; can he maintain an action on the promise of B. to return this money?" The answer is that he can, for the "contract made with the government for the payment of duties is a substantive independent contract entirely distinct from the unlawful importation." But it would be otherwise if the goods had been imported on a joint adventure by A. and B. In *McBlair v. Gibbes* (b) an assignment of shares in a company was held good as between the parties though the company had been originally formed for the unlawful purpose of supporting the Mexicans against the Spanish Government before the independence of Mexico was recognized by the United States. In *Miltenberger v. Cooke* (c) the facts were these. In 1866 a collector of United States revenue in Mississippi took bills in payment when he ought to have taken coin, his reason being that the state of the country made it still unsafe to have much coin in hand. In account with the government he charged himself and was charged with the amount as if paid in coin. Then he sued the acceptors on the bills, and it was held there was no such illegality as to prevent him from recovering. If the mode of payment was a breach of duty as against the federal government, it was open to the government alone to take any objection to it.

Fisher v.
Bridges
in Ex. Ch.

We return to our own Courts for a case where on the other hand the close connexion with an illegal design was established and the agreement held bad. In *Fisher v. Bridges* (d) the plaintiff sued the defendant on a simple covenant to pay money. The defence was that the covenant was in fact given to secure payment of part of the purchase-money of

(a) 11 Wheaton 258, 269.
(b) 17 Howard 232.
(c) 18 Wallace 421.

(d) 2 E. & B. 118, 22 L. J. Q. B. 270; in Ex. Ch. 3 E. & B. 642, 23 L. J. Q. B. 276.

certain leasehold property assigned by the plaintiff to the defendant in pursuance of an unlawful agreement that the land should be resold by lottery contrary to the Statute (a). The Court of Queen's Bench held unanimously that the covenant was good, as there was nothing wrong in paying the money, even if the unlawful purpose of the original agreement had in fact been executed: and the case was likened to a bond given in consideration of past cohabitation. But the Court of Exchequer Chamber unanimously reversed this judgment, holding that the covenant was in substance part of an illegal transaction, whether actually given in pursuance of the first agreement or not. "It is clear that the covenant was given for payment of the purchase-money. It springs from and is a creature of the illegal agreement; and as the law would not enforce the original contract, so neither will it allow the parties to enforce a security for the purchase-money which by the original bargain was tainted with illegality." They further pointed out that the case of a bond given for past cohabitation was not analogous, inasmuch as past cohabitation is not an illegal consideration but no consideration at all. But "if an agreement had been made to pay a sum of money in consideration of future cohabitation, and after cohabitation, the money being unpaid, a bond had been given to secure that money, that would be the same case as this; and such a bond could not under such circumstances be enforced."

The principle of this judgment has been criticized by considerable authority as "vague in itself and dangerous as a precedent" (b). The actual decision, however, does not appear to require anything wider than this—that where a claim for the payment of money as on a simple contract would be bad on the ground of illegality, a subsequent security for the same payment, whether given in pursuance of the original agreement or not, is likewise not enforceable: or, more shortly—

5. Any security for the payment of money under an unlawful agreement is itself void, even if the giving of the security was not part of the original agreement.

5. Security for payments under unlawful

To this extent at least the principle of *Fisher v. Bridges*

(a) 12 Geo. 2, c. 28, s. 1.

(b) 1 Sm. L. C. 400.

agreement is equally void with the original agreement. has been repeatedly acted on (a). In *Geere v. Mare* (a) a policy of assurance was assigned by deed as a further security for the payment of a bill of exchange. The bill itself was given to secure a payment by way of fraudulent preference to a particular creditor, and accepted not by the debtor himself but by a third person. It was held, both on principle and on the authority of *Fisher v. Bridges*, that the deed could not be enforced. Again in *Clay v. Ray* (a) two promissory notes were secretly given by a compounding debtor to a creditor for a sum in excess of the amount of the composition. Judgment was obtained in an action on one of these notes. In consideration of proceedings being stayed and the notes given up a third person gave a guaranty to the creditor for the amount: it was held that on this guaranty no action could be maintained.

This is a convenient place to state a rule of a more special kind which has already been assumed in the discussion of various instances of illegality, and the necessity of which is obvious: namely:—

5 a. Bond with unlawful condition is wholly void.

5 a. If the condition of a bond is unlawful, the whole bond is void (b).

Rules of Evidence and Procedure touching Unlawful Agreements.

6. Illegality may always be shown by extrinsic evidence.

6. Extrinsic evidence is always admissible to show that the object or consideration of an agreement is in fact illegal.

This is now an elementary rule both at law (c) and in equity (d). Even a document which for want of a stamp would not be available to establish any right is admissible to prove the illegal nature of the transaction to which it belongs (e).

(a) *Græme v. Wroughton*, 11 Ex. 146, 24 L. J. Ex. 265; *Geere v. Mare*, 2 H. & C. 339, 33 L. J. Ex. 50; *Clay v. Ray*, 17 C. B. N. S. 188.

(b) Co. Lit. 206 b, Shepp. Touch. 372; where it is said that if the matter of the condition be only *malum prohibitum*, the obligation is absolute (as if the condition were merely impossible): but this dis-

inction is now clearly not law: see *Duvergier v. Fellows*, 10 B. & C. 826.

(c) *Collins v. Blantern*, 1 Sm. L. C. 369.

(d) *Reynell v. Sprye*, 1 D. M. G. 660, 672, per Knight Bruce, L. J.

(e) *Coppock v. Bower*, 4 M. & W. 361.

But where the immediate object of the agreement (in the sense explained above) is not unlawful, we have to bear in mind a qualifying rule which has been thus stated :

6 a. " When it is sought to avoid an agreement not being in itself unlawful on the ground of its being meant as part of an unlawful scheme or to carry out an unlawful object, it must be shown that such was the intention of the parties at the time of making the agreement " (a).

6 a. Where unlawful intention is alleged it must be shown to have existed at date of agreement. Subsequent conduct of parties may be evidence of original unlawful intention.

The fact that unlawful means are used in performing an agreement which is *prima facie* lawful and capable of being lawfully performed does not of itself make the agreement unlawful (b). This or other subsequent conduct of the parties in the matter of the agreement may be evidence, but evidence only, that a violation of the law was part of their original intention, and whether it was so is a pure question of fact (c). The omission of statutory requisites in carrying on a partnership business is consistent with the contract of partnership itself being lawful ; but if it is shown as a fact that there was from the first a secret agreement to carry on the business in an illegal manner, the whole must be taken as one illegal transaction (d). Again, it is no answer to a claim for an account of partnership profits that there was some collateral breach of the law in the particular transaction in which they were earned (e). Where a duly enrolled deed *inter vivos* purported to create a rent-charge for charitable purposes, but the deed remained in the grantor's keeping, no payment was made during his lifetime, nor was the existence of the deed communicated to the persons interested, and the conduct of the parties otherwise showed an understanding that the deed should not take effect till after the grantor's death, it was set aside as an evasion of the Mortmain Act (f).

(a) *Lord Howden v. Simpson*, 10 A. & E. 793, 818.

(b) A subsequent agreement to vary the performance of a contract in a way that would make it unlawful is merely inoperative, and leaves the original contract in force: *City of Memphis v. Brown*, 20 Wallace 289.

(c) *Fraser v. Hill*, 1 McQu. 392.

(d) *Armstrong v. Armstrong*, 3

M. & K. 45, 64, s. c. nom. *Armstrong v. Lewis*, in Ex. Ch. 2 Cr. & M. 274, 297. Notwithstanding what is here said as to such inferences of fact being for the jury, the matter seems to have been left at large for the Court in *Waugh v. Morris*, L. R. 8 Q. B. 202 (see next paragraph).

(e) *Sharp v. Taylor*, 2 Ph. 801.

(f) *Way v. East*, 2 Drew. 44.

Again, an agreement is not unlawful merely because something remains to be done by one of the parties in order to make the performance of the agreement or of some part of it lawful, such as obtaining a licence from the Crown (a).

Waugh v. Morris.
Material on the question of intention whether the parties know the law.

In the recent case of *Waugh v. Morris* (b) it was agreed by charter-party that a ship then at Trouville should go thence with a cargo of hay to London, and all cargo was to be brought and taken from the ship alongside. Before the date of the charter-party an Order in Council had been made and published under the Contagious Diseases (Animals) Act 1869, prohibiting the landing of hay from France in this country. The parties did not know of this, and the master learnt it for the first time on arriving in the Thames. In the result the charterer took the cargo from alongside the ship in the river into another vessel and exported it, as he lawfully might, but after considerable delay. The shipowner sued him for demurrage, and he contended that the contract was illegal (though it had in fact been lawfully performed), as the parties had intended it to be performed by means which at the time of the contract were unlawful, viz. landing the hay in the port of London. The Court however refused to take this view. It was true that the plaintiff contemplated and expected that the hay would be landed, as that would be the natural course of things. But the landing was no part of the contract, and if the plaintiff had had before him the possibility of the landing being forbidden, he would 'probably have expected the defendant not to break the law ; as in fact he did not, for no attempt was made to land the goods.

"We quite agree that where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think that in order to avoid a contract which can be legally performed on the ground that there was an intention to perform it in an illegal manner, it is necessary to shew that there was the wicked intention to break the law ; and if this be so, the knowledge of what the law is becomes of great importance" (c).

(a) *Sewell v. Royal Exch. Assurance Co.* 4 Taunt. 856 ; *Haines v. Busk*, 5 ib. 821 ; cp. *Porter's ca.* 1 Co. Rep. 25 a, the like as to a condition

in a devise.

(b) L. R. 8 Q. B. 202.

(c) L. R. 8 Q. B. 207-8.

A still more recent case in the Queen's Bench may also be referred to as illustrating the general rule that an unlawful intention is not to be presumed. It is not illegal for a highway board to give a licence to a gas company to open a highway within the board's jurisdiction, for it must be taken to mean that they are to do it so as not to create a nuisance (a).

But on the other hand where an agreement is *prima facie* illegal, it lies on the party seeking to enforce it to show that the intention was not illegal. It is not enough to show a mere possibility of the agreement being lawfully performed in particular contingent events. "If there be on the face of the agreement an illegal intention, the burden lies on the party who uses expressions *prima facie* importing an illegal purpose to show that the intention was legal" (b).

Where agreement *prima facie* unlawful, not enough to show mere possibility of lawful performance.

We now come to the rule, which we will first state provisionally in a general form, that money or property paid or delivered under an unlawful agreement cannot be recovered back.

As to recovering back money or property.

This rule (which is subject to exceptions to be presently stated) is the chief part, though not quite the whole, of what is meant by the maxim *In pari delicto potior est conditio defendentis* (c). To some extent it coincides with the more general rule that money voluntarily paid with full knowledge of all material facts cannot be recovered back. However the principle proper to this class of cases is that persons who have entered into dealings forbidden by the law must not expect any assistance from the law, save so far as the simple refusal to enforce such an agreement is unavoidably beneficial to the party sued upon it. As it is sometimes expressed, the Court is neutral between the parties. The matter is thus put by Lord Mansfield :

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is

Lord Mansfield's ex-

(a) *Edgware Highway Board v. Harrow Gas Co.* L. R. 10 Q. B. 92.

(b) *Holland v. Hall*, 1 B. & Ald. 53, per Abbott, J. The same principle is expressed in a different form by Paulus : "Item quod leges fieri prohibent, si perpetuam causam servaturum est, cessat obligatio . . .

quamquam etiam si non sit perpetua causa . . . idem dicendum est, quia statim contra mores sit." D. 45. 1. de v. o. 35 § 1.

(c) Cp. D. 50. 17. de reg. iuris, 154, C. 4. 7. de condict. ob turpem causam, 2.

planation of the rule. ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*" (a).

Plaintiff can't recover where his own unlawful conduct is part of his own case. The test for the application of the rule is whether the plaintiff can make out his case otherwise than "through the medium and by the aid of an illegal transaction to which he was himself a party" (b). It is not confined to the case of actual money payments, though that is the most common. Where the plaintiff had deposited the half of a bank note with the defendant by way of pledge to secure the repayment of money due for wine and suppers supplied by the defendant in a brothel and disorderly house kept by the defendant for the purpose of being consumed there in a debauch, and for money lent for similar purposes, it was held that the plaintiff could not recover, as it was necessary to his case to show the true character of the deposit. (This is apparent by the course of the pleadings: the declaration was on a bailment of the half-note to be re-delivered on request, and in detinue. Pleas, in effect, that it was deposited by way of pledge to secure money due. Replication, the immoral character of the debt as above) (c). The Court inclined also to think, but did not decide, that the plaintiff's case must fail on the more general ground that the delivery of the note was an executed contract by which a special property passed, and that such property must remain (d).

The rule is not even confined to causes of action *ex contractu*.

(a) *Holman v. Johnson*, Cowp. 341, 343.

(b) *Taylor v. Chester*, L. R. 4 Q. B. 309, 314.

(c) L. R. 4 Q. B. at p. 312.

(d) Compare *Ex parte Caldecott*, 4 Ch. D. 150, p. 291 above; *Begbie v. Phosphate Sewage Co.* L. R. 10 Q. B. 491, 500, *affd.* in C. A. 1 Q. B. D. 679.

An action in tort cannot be maintained when the cause of action springs from an illegal transaction to which the plaintiff was a party, and that transaction is a necessary part of his case (a).

Independently of the special grounds of this rule, a completely executed transfer of property, though originally made upon an unlawful consideration or in pursuance of an unlawful agreement, is afterwards valid and irrevocable both at law and in equity (b).

The rule is not applicable in the following classes of cases, most of which however cannot properly be called exceptions.

An agent is not discharged from accounting to his principal by reason of past unlawful acts or intentions of the principal collateral to the matter of the agency. If A. pays money to B. for the use of C., B. cannot justify a refusal to pay over to C. by showing that it was paid under an unlawful agreement between A. and C. (c). Again, if A. and B. make bets at a horse-race on a joint account and B. receives the winnings, A. can recover his share of the money or sue on a bill given to him by B. for it: here however there is nothing *illegal* in any part of the business (d). In like manner the right to an account of partnership profits is not lost by the particular transaction in which they were earned having involved a breach of the law (e). Nor can a trustee of property refuse to account to his *cestui que trust* on grounds of this kind: a trust was enforced where the persons interested were the members of an unincorporated trading association, though it was doubtful whether the association itself was not illegal (f). So, if A. with B.'s consent effects a policy for his own benefit on the life and in the name of B., having himself no insurable interest, the policy and the value of it belong, as between them, to A. (g). If a man entrusts another

Duty of agents and trustees to account to principals notwithstanding collateral illegality.

(a) *Fivaz v. Nicholls*, 2 C. B. 501, 513.

(b) *Ayerst v. Jenkins*, 16 Eq. 275. Cp. *McCallan v. Mortimer* (Ex. Ch.) 9 M. & W. 636.

(c) *Tenant v. Elliott*, 1 B. & P. 8.

(d) *Johnson v. Lansley*, 12 C. B. 468. And where B. uses moneys of his own and A.'s in betting, on the terms of dividing winnings in certain proportions, A. can sue B. on a cheque given for his share of winnings: *Beeston v. Beeston*, 1 Ex. D.

13. Cp. and dist. *Higginson v. Simpson*, 2 C. P. D. 76, where the transaction in question was held to be in substance a mere wager.

(e) *Sharp v. Taylor*, 2 Ph. 801. Of course it is not so where the main object of the partnership is unlawful. See Lindley, l. 203-212.

(f) *Sheppard v. Oxenford*, 1 K. & J. 491.

(g) *Worthington v. Curtis*, 1 Ch. D. 419.

as his agent with money to be paid for an unlawful purpose, he may recover it at any time before it is actually so paid ; or even if the agent does pay it after having been warned not to do so (a) ; the reason of this, clearly put in one of the earlier cases (b), is that whether the intended payment be lawful or not an authority may always be countermanded as between the principal and agent so long as it is not executed (c). It is the same where the agent is authorized to apply in an unlawful manner any part of the moneys to be received by him on account of the principal ; he must account for so much of that part as he has not actually paid over (c). The language of the statute 8 & 9 Vict. c. 109, s. 18, which says that no money can be recovered " which shall have been deposited in the hands of any person to abide the event upon which any wager shall have been made " does not prevent either party from repudiating the wager at any time either before or after the event and before the money is actually paid over and recovering his own deposit from the stakeholder (d).

Money
recover-
able back,
where
agreement
not exe-
cuted.

Where money has been paid under an unlawful agreement, but nothing else done in performance of it, the money may be recovered back. But in the decision which establishes this exception it is intimated that it probably would not be allowed if the agreement were actually criminal or immoral (e). " If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out ; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action " (f). And the action cannot be maintained by a party who has not given previous notice that he repudiates the agreement and claims his money back (g). In *Taylor v. Bowers* (f) A. had delivered goods to B. under a fictitious assignment for the purpose of defrauding A.'s creditors. B. executed a bill of sale of the goods to C., who was privy to

(a) *Hastelow v. Jackson*, 8 B. & C. 231, 226.

(b) *Taylor v. Lendey*, 9 East 49.

(c) *Bone v. Ekless*, 5 H. & N. 925, 29 L. J. Ex. 438.

(d) *Diggle v. Higgs*, (C. A.) 2 Ex. D. 422 ; *Hampden v. Walsh*, 1 Q. B. D. 189, where former authorities

are collected and considered.

(e) *Tappenden v. Randall*, 2 B. & P. 467.

(f) Per Mellish, L. J. *Taylor v. Bowers*, 1 Q. B. D. 291, 300.

(g) *Palyart v. Leckie*, 6 M. & S. 290.

the scheme, without A.'s assent. It was held that A. might repudiate the whole transaction and demand the return of the goods from C. In *Symes v. Hughes* (a), a case somewhat of the same kind, the plaintiff had assigned certain leasehold property to a trustee with the intention of defeating his creditors; afterwards under an arrangement with his creditors he sued for the recovery of the property, having undertaken to pay them a composition in case of success. The Court held that, as the illegal purpose had not been executed, he was entitled to a reconveyance. It will be observed however that the plaintiff was in effect suing as a trustee for his creditors, so that the real question was whether the fraud upon the creditors should be continued against the better mind of the debtor himself. The cases above mentioned as to recovering money from agents or stakeholders are also put partly on this ground, which however does not seem necessary to them (b).

In certain cases the parties are said not to be in *pari delicto*, namely where the unlawful agreement and the payment take place under circumstances practically amounting to coercion. The chief instances of this kind in courts of law have been payments made by a debtor by way of fraudulent preference to purchase a particular creditor's assent to his discharge in bankruptcy or to a composition. The leading case is now *Atkinson v. Denby* (c). There the defendant, one of the plaintiff's creditors, refused to accept the composition unless he had something more, and the plaintiff paid him 50% before he executed the composition deed. It was held that this money could be recovered back. "It is true" said the Court of Exchequer Chamber "that both are in delicto, because the act is a fraud upon the other creditors, but it is not *pari delictum*, because the one has the power to dictate, the other no alternative but to submit." On the same ground money paid for compounding a

Parties not in *pari delicto*. Purchase of creditor's assent to composition.

(a) 9 Eq. 475.

(b) *Hastelow v. Jackson*, 8 B. & C. 221. *Mearing v. Hellings*, 14 M. & W. 711, where that case was doubted, decides only this: A man cannot sue a stakeholder for the whole of the sweepstakes he has won in a lottery, and then reply to the objection of illegality that if the whole thing is

illegal he must at all events recover his own stake. *Allegans contraria non est audiendus*.

(c) 6 H. & N. 778, 30 L. J. Ex. 361, in Ex. Ch. 7 H. & N. 934, 31 L. J. Ex. 362: the chief earlier ones are *Smith v. Bromley*, 2 Doug. 695, *Smith v. Cuff*, 6 M. & S. 160.

penal action contrary to the statute of Elizabeth may be recovered back (a). But where a bill is given by way of fraudulent preference to purchase a creditor's assent to a composition, and after the composition the debtor chooses to pay the amount of the bill, this is a voluntary payment which cannot be recovered (b).

Like
doctrine
of equity.

In equity the application of this doctrine has been the same in substance, though more varied in its circumstances. Courts of Equity do not as a rule order the return of money or set aside instruments when the parties are in *pari delicto*; but they will do so in the cases thus described by Knight Bruce, L. J.: "Where the parties to a contract against public policy or illegal are not in *pari delicto* (and they are not always so) and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities, of which *Osborne v. Williams* [see below] is one" (c).

Special
grounds of
relief.

On this principle relief was given and an account decreed in *Osborne v. Williams* (d), where the unlawful sale of the profits of an office was made by a son to his father after the son had obtained the office in succession to his father and upon his recommendation, so that he was wholly under his father's control in the matter. In *Reynell v. Sprye* (e) an agreement bad for champerty was set aside at the suit of the party who had been induced to enter into it by the other's false representations that it was a usual and proper course among men of business to advance costs and manage litigation on the terms of taking all the risk and sharing the property recovered. And in a later case a mortgage to secure a loan of money which in fact was lent upon an immoral consideration was set aside at the suit of the borrower on the ground that the interest of others besides parties to the corrupt bargain was involved (f). A wider exception is made, as we have seen above, in the case of agreements of which the consideration is future illicit cohabitation between the parties. The treatment of this kind of agreements is altogether somewhat

(a) *Williams v. Hedley*, 8 East 378.

(b) *Wilson v. Ray*, 10 A. & E. 82.

(c) *Reynell v. Sprye*, 1 D. M. G. 660, 679.

(d) 18 Ves. 379.

(e) 1 D. M. G. 660, 679.

(f) *W. v. B.* 32 Beav. 574.

anomalous and ill-defined, and may be considered open to review by a Court of Appeal should occasion arise. Apart from this particular question, there seems to be no reason (at all events since the Judicature Acts) why the analogy of the cases in equity where agreements have been set aside should not apply to the legal right of recovering back money paid. If this be correct, the rule and its qualifications will be to this effect :

7. Money paid or property delivered under an unlawful agreement cannot be recovered back, nor the agreement set aside at the suit of either party—

Statement of the rule as qualified.

unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself (and the agreement is not positively criminal or immoral?) ;

or unless the agreement was made under such circumstances as between the parties that if otherwise lawful it would be voidable in equity at the option of the party seeking relief (a) ;

or, in the case of an action to set aside the agreement, unless in the judgment of the Court the interests of third persons require that it should be set aside.

8. Where a difference of local laws is in question, the lawfulness of a contract is to be determined by the law governing the substance of the contract (that is, according to the prevailing opinion, the law of the place where it is to be performed, if any particular place of performance is expressed by the contract or implied in its nature, or otherwise the law of the place where the contract is made).

8. Conflict of laws in space. *Lex loci solutionis* prevails :

Exception 1.—An agreement entered into by a citizen in violation of a prohibitory law of his own state cannot in any case be enforced in any court of that state.

unless excluded by prohibitory municipal law of the forum : or unless the agreement is contrary to common justice or interests of the State.

Exception 2.—An agreement contrary to common principles of justice or morality, or to the interests of the state, cannot in any case be enforced.

What we here have to do with is in truth a fragment of a

(a) This form of expression is not positively warranted by the autho-

rities, but is submitted as fairly representing the result.

much larger subject, namely the consideration of the local law governing obligations in general (*a*).

As to the
first excep-
tion.

The main proposition is well established, and it would be idle to attempt in this place any abridgment or re-statement of what is said upon it by the writers on Private International Law to whose works the reader is referred in the last note. The first exception is a simple one. The municipal laws of a particular state, especially laws of a prohibitory kind, are as a rule directed only to things done within its jurisdiction. But a particular law may positively forbid the subjects of the state to undertake some particular class of transactions in any part of the world: and where such a law exists, the courts of that state must give effect to it. A foreigner cannot sue in an English court on a contract made with a British subject, and itself lawful at the place where it was made, if it is such that British subjects are forbidden by Act of Parliament to make it anywhere (*b*). It may be doubted whether such a contract would be recognized even by the courts of the state where it was made, unless the prohibition were of so hostile or restrictive a character as between the two states (*e.g.* if the rulers of a people skilled in a particular industry should forbid them to exercise or teach that industry abroad) as not to fall within the ordinary principles of comity. The authorities already cited (p. 257 above) as to marriages within the prohibited degrees contracted abroad by British subjects may also be usefully consulted as illustrating this topic.

As to the
second
exception.

The second exception is by no means free from difficulties touching its real meaning and extent (*c*). There is no doubt that an agreement will not necessarily, though it will generally, be enforced if lawful according to its proper local law. The reasons for which the court may nevertheless refuse to enforce it have been variously expressed. We read that agreements

(*a*) For the treatment of it in this connexion, see Savigny, Syst. 8. 269-278 (§ 874 C.); Westlake on Private Intern. Law, 176, 180; Story, Conflict of Laws, §§ 243 sqq. 258 sqq.; Wharton, §§ 482-497.

(*b*) *Santos v. Illidge*, in Ex. Ch. 8 C. B. N. S. at p. 874, 29 L. J. C.

P. at p. 350, per Blackburn, J.

(*c*) "Whether an action can be supported in England on a contract which is void by the law of England, but valid by the law of the country where the matter is transacted, is a great question": per Wilmot, J. *Robinson v. Bland*, 2 Burr. 1083.

must be held void apart from any question of local law if they are "in their own nature founded in moral turpitude and are inconsistent with the good order and solid interests of society" (a); or if they are "contrary to the law of nature or hurtful to the purity of morals"; that "no state can be justified in directing its tribunals to enforce obligations which it holds to be founded in wrong" (b). Sometimes it is said in still more general terms that an agreement must be lawful by the law of the country where it is sued upon: but this form of statement at any rate may be dismissed as too wide.

It may be taken for granted that the courts of a civilized state cannot give effect to rights alleged to be valid by some local law, but arising from a transaction plainly repugnant to the *jus gentium* in its proper sense—the principles of law and morality common to civilized nations. In other words, a local law cannot be recognized, though otherwise it would be the proper law to look to, if it is in derogation of all civilized laws. This indeed seems a fundamental assumption in the administration of justice, in whatever forum and by whatever procedure, rather than a specific proposition of either municipal or international law. Likewise it is clear that no court can be bound to enforce rights arising under a system of law so different from its own, and so unlike anything it is accustomed to, that not only its administrative means, but the legal conceptions which are the foundation of its procedure, and its legal habit of mind (c), so to speak, are wholly unfitted to deal with them. For this reason the English Divorce Court cannot entertain a suit founded on a Mormon marriage. Apart from the question whether such marriages would be regarded by our courts as immoral *jure gentium* (d), the matrimonial law of England is wholly inapplicable to polygamy, and the attempt to apply it would lead to manifest absurdities (e). Practically these diffi-

Transactions contrary to common principles of civilized nations, or founded on a wholly foreign system of family relations, can't be recognized.

(a) Story, § 258.

(b) Westlake, 180.

(c) In German one might speak without any strangeness of the *Rechtserkenntnis* of the Court.

(d) A conclusion which would not imply any offence to the Queen's Mahometan subjects, or be inconsistent with our administration of

native law in British India. The immemorial institutions of Eastern races are obviously on a different footing altogether from the fantastic and retrograde devices of a degenerate fraction in the West.

(e) *Hyde v. Hyde & Woodmansee*, L. R. 1 P. & D. 130.

culties can hardly arise except as to rights derived from family relations. One can hardly imagine them in the proper region of contracts.

But opposition to municipal principles of law not enough.

Contract for sale of slaves enforced in *Santos v. Illidge*.

Again, there are sundry judicial observations to be found which go to the further extent of saying that no court will enforce anything contrary to the particular views of justice morality or policy whereon its own municipal jurisprudence is founded. And this doctrine is supported by the unhesitating acceptance of text-writers, which in this department of law must needs count for more than in any other, owing to its comparative poverty in decisive authorities (*a*). But a test question on this doctrine is to be found in the treatment of rights arising out of slavery by the courts of a free country: and for England at least the decision of the Exchequer Chamber in *Santos v. Illidge* (*b*) has given such an answer to it as makes the prevailing opinion of the books untenable. Slavery is as repugnant to the principles of English law as anything can well be which is so far admitted by any other civilized system that any serious question of the conflict of laws can arise upon it. There is no doubt that neither the *status* of slavery nor any personal right of the master or duty of the slave incident thereto can exist in England (*c*), or within the protection of English law (*d*). But it long remained uncertain how an English court would deal with a contract concerning slaves which was lawful in the country where it was made and to be performed. Passing over earlier and indecisive authorities (*e*), we find Lord Mansfield assuming that a contract for the sale of a slave may be good here (*f*). On the other hand Best, J. thought no action "founded upon a right arising out of slavery" would be maintainable in the municipal courts of this country (*g*). But in *Santos v.*

(*a*) See the books above referred to, p. 334, n. (*a*), and Chitty on Contracts, Ch. 4, *init.*

(*b*) 8 C. B. N. S. 861, 29 L. J. C. P. 348, revg. s. c. in court below, 6 C. B. N. S. 841, 28 L. J. C. P. 317. Very strangely there is no mention of the case either in Wharton's Conflict of Laws or in the last edition of Story.

(*c*) *Sommersett's case* 20 St. T. 1.

(*d*) *Viz.* on board an English ship

of war on the high seas or in hostile occupation of territorial waters, *Forbes v. Cochrane*, 2 B. & C. 448.

(*e*) They are collected in Hargrave's argument in *Sommersett's case*.

(*f*) 20 St. T. 79.

(*g*) *Forbes v. Cochrane*, 2 B. & C. at p. 468. To same effect Story § 259 (in spite of American authority being adverse), approved by Westlake, 183.

Illidge (a) a Brazilian sued an English firm trading in Brazil for the non-delivery of slaves under a contract for the sale of them in that country, which was valid by Brazilian law. Both in the C. P. and in the Ex. Ch. the only question discussed was whether the sale was or was not under the circumstances made illegal by the operation of the statutes against slave trading: and in the result the Ex. Ch. held that it was not. It was not even contended that at common law the Court must regard a contract for the sale of slaves as so repugnant to English principles of justice that, wherever made, it could not be enforced in England. Nor can it be suggested that the point was overlooked, for it appears to have been marked for argument: perhaps it is a matter for regret that it was not insisted upon, and an express decision obtained upon it: but as it is, it now seems impossible to say that purely municipal views of right and wrong can prevail against the recognition of a foreign law. Moreover, apart from this decision, the cases in which the dicta relied upon for the wider doctrine have occurred have in fact been almost always determined on considerations of local law, and in particular of the law of the place where the contract was to be performed.

Thus in *Robinson v. Bland* (b) the plaintiff sued (1) upon a bill of exchange drawn upon *England* to secure money won at play in France: (2) for money won at play in France: (3) for money lent for play at the same time and place. As to the bill, it was held to be an English bill; for the contract was to be performed by payment in England, and therefore to be governed by English law. For the money won, it could not have been recovered in a French Court of justice (c), and so *quacunque via* could not be sued for here; but as to the money lent, the loan was lawful in France and therefore recoverable here. Wilmot, J. said that an action could be maintained in some countries by a courtesan for the price of her prostitution, but certainly would not be allowed in England, though the cause of action arose in one of those countries. Probably no such local law now exists. But if it did, and if it were attempted to

(a) See note (b) page 336.

(b) 2 Burr. 1077.

(c) Nor, under the circumstances, in the marshal's court of honour which then existed; but it seems

the Court would in any case have declined to take notice of an extraordinary and extra-legal jurisdiction of that sort.

enforce it in our courts, we could appeal, not to our own municipal notions of morality, but to the Roman law as expressing the common and continuous understanding of civilized nations. Such a bargain is immoral *jure gentium*.

In *Quarrier v. Colston* (a) it was held that money lent by one English subject to another for gaming in a foreign country where such gaming was not unlawful might be recovered in England. This, as well as the foregoing case, is not inconsistent with the rule that the law of the place of performance is to be followed. It must be taken, no doubt, that the parties contemplated payment in England. Then, what says the law of England? Money lent for an unlawful use cannot be recovered. Then, was this money lent for an unlawful use? That must be determined by the law existing at the time and place at which the money was to be used in play. That law not being shown to prohibit such a use of it, there was no unlawful purpose in the loan, and there was a good cause of action, not merely by the local law (which in fact was not before the Court) (b), but by the law of England. These cases do show, however, that the English law against gaming is not considered to be founded on such high and general principles of morality that it is to override all foreign laws, or that an English court is to presume gaming to be unlawful by a foreign law (c).

In *Hope v. Hope* (d) an agreement made between a husband and wife, British subjects domiciled in France, provided for two things which made the agreement void in an English court: the collusive conduct of a divorce suit in England, and the abandonment by the husband of the custody of his children. It is worth noting that at the time of the suit the husband was resident in England, and it does not seem clear that he had not recovered an English domicil. Knight Bruce, L. J. put his judgment

(a) 1 Ph. 147.

(b) The local law might conceivably, without making gaming unlawful, reduce debts for money lent at play to the rank of natural obligations or debts of honour not enforceable by legal process: if the view in the text be correct, the existence of such a law would make no difference in the English court.

(c) *Contra* Savigny, who thinks

laws relating to usury and gaming must be reckoned strictly compulsory (*von streng positiver, zwingender Natur*)—i.e. must be applied without regard to local law by every Court within their allegiance, but are not to be regarded by any Court outside it. Syst. 8. 276.

(d) 8 D. M. G. 731; per Knight Bruce, L. J. at p. 740; per Turner L. J. at p. 743.

partly on the ground that an important part at least of the provisions of the document was to be carried into effect in England. Turner, L. J. did say in general terms that a contract must be consistent with the laws and policy of the country where it is sought to be enforced, and he appears to have thought the provision as to the custody of the children was one that an English court must absolutely refuse to enforce, whether to be performed in England or not, and whether by a domiciled British subject or not. But this is neither required by the decision nor reconcileable with *Santos v. Illidge*.

In *Grell v. Levy* (a) an agreement was made in France between an English attorney and a French subject that the attorney should recover a debt for the client in England and keep half of it. Our rules against champerty are not known to the French law : but here the agreement was to be performed in England by an officer of an English court (b). Perhaps, indeed, the English law governing the relations and mutual rights of solicitor and client may be regarded as a law of English procedure ; and in that character, of course, private arrangements cannot acquire any greater power to vary it by being made abroad (c).

As for agreements contrary to the public interests of the state in whose courts they are sued upon, it is obvious that the courts must refuse to enforce them without considering any foreign law. The like rule applies to the class of agreements in aid of hostilities against a friendly state of which we have already spoken. In practice, however, an agreement of this kind is more likely than not to be unlawful everywhere. Thus an agreement made in New York to raise a loan for the insurgents in Cuba would not be lawful in England ; but it would also not be lawful in New York, and for the same reason. It might possibly happen on the other hand that the United States should recognize the Cuban insurgents while they were not recognized by England ; and in that case the courts of New York would regard the contract as lawful, but ours would not.

It should be borne in mind that the foregoing discussion has nothing to do with the *formal* validity of contracts, which is governed by other rules (expressed in a general way by the

(a) 16 C. B. N. S. 73.

(b) Per Erle, C. J. at p. 79.

(c) See judgment of Williams, J.

maxim *locus regit actum*); and also that all rules of private international law depend on practical assumptions as to the conduct to be expected at the hands of civilized legislatures and tribunals. It is in theory perfectly competent to the sovereign power in any particular state to impose any restrictions, however capricious and absurd, on the action of its own municipal courts; and even to municipal courts, in the absence of any paramount directions, to pay as much or as little regard as they please to any foreign opinion or authority.

Conflict of laws in time.
9. Where performance becomes unlawful, contract dissolved.

9. Where the performance of a contract lawful in its inception is made unlawful by any subsequent event, the contract is thereby dissolved (*a*).

Explanation.—Where the performance is subsequently forbidden by a *foreign* law, it is deemed to have become not unlawful but impossible (*b*).

This rule does not call for any discussion. It is admitted as certain in *Atkinson v. Ritchie* (*a*) and is sufficiently illustrated by the modern case of *Esposito v. Bowden* (*a*) of which some account has already been given. It applies to negative as well as to affirmative promises. “It would be absurd to suppose that an action should lie against parties for doing that which the legislature has said they shall be obliged to do” (*c*). To the qualification we shall have to return in the following chapter on Impossibility.

10. Otherwise law at date of agreement governs.

10. Otherwise the validity of a contract is generally determined by the law as it existed at the date of the contract.

This is a wider rule than those we have already stated, as it applies to the form as well as to the substance of the contract, and not only to the question of legality but to the incidents of the contract generally (*d*). It is needless to seek authority to show that an originally lawful contract cannot become in itself unlawful by a subsequent change in the law (*e*). It does not seem certain, however, that the converse proposition would always hold good. Perhaps the parties might be entitled to the

Qu. when agreement made in ignorance of its ille-

(*a*) *Atkinson v. Ritchie*, 10 East 530; *Esposito v. Bowden*, p. 282, *supra*.

(*b*) *Barker v. Hodgson*, 3 M. & S. 267.

(*c*) *Wynn v. Shropshire Union Rys. & Canal Co.* 5 Ex. 420, 440.

(*d*) Sav. Syst. § 392 (8. 435).

(*e*) See *Boyce v. Tabb*, 18 Wallace (Sup. Ct. U. S.) 546; *supra*, p. 275.

benefit of a subsequent change in the law if their actual intention in making the contract was not unlawful. gality, and performance afterwards becomes lawful.

The question may be put as follows on an imaginary case, which the facts of *Waugh v. Morris* (a) show to be quite within the bounds of possibility. A. and B. make an agreement which by reason of a state of things not known to them at the time is not lawful. That state of things ceases to exist before it comes to the knowledge of the parties and before the agreement is performed, but A. refuses to perform the agreement on the ground that it was unlawful when made. Is this agreement a contract on which B. can sue A.? Justice and reason seem to call for an affirmative answer, and the analogy of *Waugh v. Morris* (a), where the Court looked to the actual knowledge and intention of the parties at the time of the contract, is also in its favour. Apart from this, a contract which provides for something known to the parties to be not lawful at the time being done in the event, and only in the event, of its being made lawful, is free from objection and valid as a conditional contract (b): unless, indeed, the thing were of such a kind that its becoming lawful could not be seriously contemplated. Contract conditional on performance becoming lawful.

It may perhaps be useful to collect here in a separate form the results of the foregoing discussion, so far as they show in what circumstances and to what extent the knowledge of the parties is material on the question of illegality. General results as to knowledge of parties.

a. Immediate object of agreement unlawful. Knowledge of either or both parties is immaterial (c): except, perhaps, where the agreement is made in good faith and in ignorance of a state of things making it unlawful: and in this case it is submitted for the reasons above given that the agreement becomes valid if that state of things ceases to exist in time for the agreement to be lawfully performed according to the original intention.

β. A. makes an agreement with B. the execution of which would involve an unlawful act on B's part (e.g. a breach of B's contract with C.).

(a) L. R. 8 Q. B. 202; *supra* p. 326.

(b) *Taylor v. Chichester & Midhurst Ry. Co.* L. R. 4 H. L. 628, 640, 645; cp. *Mayor of Norwich v.*

Norfolk Ry. Co. 4 E. & B. 397, 24 L. J. Q. B. 105, *supra*, p. 245.

(c) A strong illustration of this will be found in *Wilkinson v. Loudon-sack*, 3 M. & S. 117.

If A. does not know this, there is a good contract, and A. can sue B. for a breach of it, though B. cannot be compelled to perform it or may be restrained (a) from performing it. (We may say if we like that B. is deemed to warrant that he can lawfully perform his contract.)

The contract is voidable at A's option *on the ground of fraud*, if B. has falsely stated or actively concealed the facts, but not otherwise (b).

If A. does know it, the agreement is void.

γ. A. makes an agreement with B. who intends by means of the agreement or of something to be obtained or done under it to effect an unlawful or immoral purpose.

If A. does not know of this purpose, there is a contract voidable at his option when he discovers it.

If he does know of it, the agreement is void.

Besides the catalogue of occupations &c. regulated by statutes which we have already promised, we give by way of appendix the provisions of the Indian Contract Act on the subjects comprised in this chapter.

APPENDIX C.

The occasional asterisks mean that further remarks on the Act or matter thus denoted will be found in the chapter on Agreements of Imperfect Obligation.

Apothecaries, 55 Geo. 3, c. 194.

Attorneys. See *Solicitors*.

Bankers. 3 & 4 Wm. 4, c. 98; 7 & 8 Vict. c. 32; 8 & 9 Vict. c. 76; 17 & 18 Vict. c. 83. See Lindley, l. 191.

Brokers. 6 Ann. c. 68 (Rev. Stat.); 57 Geo. 3, c. lx.; rep. in part, 33 & 34 Vict. c. 60. *Smith v. Lindo*, 5 C. B. N. S. 395, 5 *ib.* 587.

Building. See *Metropolitan*.

Cattle. (Sale in London) 31 Geo. 2, c. 40.

Chain Cables and Anchors. (Sale forbidden if not tested and stamped) 34 & 35 Vict. c. 101, s. 7.

Chimney Sweepers must take out a certificate, and are liable to penalties if they exercise their business without one: 38 & 39 Vict. c. 70.

(a) *Jones v. North*, 19 Eq. 426.

(b) *Beachey v. Brown*, E. B. & E. 796, 29 L. J. Q. B. 105; but one

can never be quite safe in drawing any general conclusion from a decision on the contract to marry.

Clergy. Charging benefices forbidden, 13 Eliz. c. 20. Trading forbidden, 1 & 2 Vict. c. 106. *Supra*, p. 264.

Coals. (Sale in London) 1 & 2 Vict. c. cli.

Companies. (Formation of: partnerships of more than ten persons for banking, or twenty for other purposes, must if not otherwise privileged be registered under the Act) Companies Act 1862, s. 4.

Conveyancers. 33 & 34 Vict. c. 97, s. 60. *Supra*, p. 262.

Dangerous Goods (importation, manufacture, sale, and carriage).

Nitro-glycerine, &c. Explosives Act 1875, 38 Vict. c. 17.

Petroleum, &c. 34 & 35 Vict. c. 105.

Excise. General regulations as to trades and businesses subject to laws of—

7 & 8 Geo. 4, c. 53. 4 & 5 Vict. c. 20.

4 & 5 Wm. 4, c. 51. 26 & 27 Vict. c. 33, s. 15.

3 & 4 Vict. c. 17. 30 & 31 Vict. c. 90, s. 17.

Game (sale of). 1 & 2 Wm. 4, c. 32. *Porritt v. Baker*, 10 Ex. 759.

Gaming Securities. 5 & 6 Wm. 4, c. 41.

Gunpowder (manufacture and keeping). Explosives Act 1875.

Insurance (Life). Assured must have interest, 14 Geo. 3, c. 48. See Leake on Contracts, 380. The statute is a defence for the insurers, but if they choose to pay on an insurance without interest the title to the insurance moneys as between other persons is not affected: *Worthington v. Curtis*, 1 Ch. D. 419, see p. 329 *supra*.

(Marine). The like: insurances of goods on British ships, "interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer," are made void by 19 Geo. 2, c. 37. See notes to *Goram v. Sweeting*, 2 Wms. Saund. 592-7. The prohibition of this statute extends to policies on profit and commission: *Allkins v. Jupe*, 2 C. P. D. 375.

* Requirement of stamped policy, 30 & 31 Vict. c. 23.

Intoxicating Liquors. Licensing Acts, 1872-1874, 35 & 36 Vict. c. 94, and 37 & 38 Vict. c. 49 (and several earlier Acts.)

Lotteries. Forbidden by 10 Wm. 3, c. 23 (Rev. Stat: *ul.* 17) and a series of penal statutes of which the last is 8 & 9 Vict. c. 74.

* *Medical Practitioners.* 21 & 22 Vict. c. 90, 22 Vict. c. 21, 23 & 24 Vict. cc. 7, 66.

Metropolitan Buildings. 18 & 19 Vict. c. 122, 25 & 26 Vict. c. 102.

Money. Contracts &c. must be made in terms of some currency. Coinage Act 1870, 33 Vict. c. 10, s. 16.

Old Metal. (Minimum quantities to be bought at one time by dealer in) Prevention of Crimes Act 1871, 34 & 35 Vict. c. 112, s. 13.

Passenger steamer. Voyage without Board of Trade certificate unlawful, Merchant Shipping Act 1854, (17 & 18 Vict. c. 104) s. 318.

Dudgeon v. Pembroke, L. R. 9 Q. B. 581.

Paumbrokers. 35 & 36 Vict. c. 93. *Supra*, p. 263.

Poison (sale of). 31 & 32 Vict. c. 121, s. 17, and see 32 & 33 Vict. c. 117, s. 3. *Berry v. Henderson*, L. R. 5 Q. B. 296.

Printing. 32 & 33 Vict. c. 24. *Bensley v. Bignold*, *supra*, p. 260.

Public Office (sale forbidden). 5 & 6 Edw. 6, c. 16; 3 Geo. 1, c. 15; 49 Geo. 3, c. 126; 53 Geo. 3, c. 54; 1 & 2 Geo. 4, c. 54; see *Græme v. Wroughton*, 11 Ex. 146, 24 L. J. Ex. 265; and Benjamin, 437-442.

Religious Opinions (expression of). 9 Wm. 3, c. 35 (Rev. Stat: *al.* c. 32). See *Cowan v. Milbourn*, L. R. 2 Ex. 230.

Seamen. Sale of or charge upon wages or salvage invalid, 17 & 18 Vict. c. 104, s. 233.

Simony. Purchase of next presentation, 13 Ann. c. 11 (Rev. Stat: *al.* 12 Ann. stat. 2, c. 12). The purchase of a life estate in an advowson is not within the statute, and the purchaser, if a clerk, may offer himself for admission on the next avoidance: *Walsh v. Bishop of Lincoln*, L. R. 10 C. P. 518.

Slave Trade. Illegal, and contracts relating to avoided, 5 Geo. 4, c. 113, 6 & 7 Vict. c. 88. As to construction of the statutes on contracts made abroad, *Santos v. Illidge*, 6 C. B. N. S. 841, 28 L. J. C. P. 317, in Ex. Ch. 8 *ib.* 861, 29 L. J. C. P. 348.

Solicitors. The principal Act is 23 & 24 Vict. c. 127. Unqualified persons are forbidden to practise *and a solicitor omitting to take out annual certificate cannot recover costs. Special agreements in writing between solicitor and client as to remuneration are now valid, 33 & 34 Vict. c. 28, ss. 4-15, if not in the nature of champerty, s. 11: *they cannot be sued upon, but may be enforced or set aside in a discretionary manner on motion or petition, ss. 8, 9. See *Rees v. Williams*, L. R. 10 Ex. 200. A promise to charge no costs at all in the event of losing the action is good apart from the statute, and is not touched by s. 11. *Jennings v. Johnson*, L. R. 8 C. P. 425.

Spirits &c. (sale of). *In small quantities, 24 Geo. 2, c. 40, s. 12 (Tippling Act); 25 & 26 Vict. c. 38; 30 & 31 Vict. c. 142, s. 4. To passengers on ship during voyage, 18 & 19 Vict. c. 119, s. 62.

Spirits (methylated) as to making, warehousing, sale &c.: 18 & 19 Vict. c. 38 (and several later Acts).

Sunday. Work in ordinary callings by tradesmen, &c., and public sales by any person on Sunday forbidden, also travelling with boats or barges, 29 Car. 2, c. 7. See Benjamin on Sale, 442-5.

* *Trade Union Contracts*, 34 & 35 Vict. c. 31, s. 4.

Usury. The various statutes which fixed (with sundry exceptions) a maximum rate of lawful interest were all repealed by 17 & 18 Vict. c. 90. It would be perhaps needless at such a distance of time to mention this, were it not that by an extraordinary oversight the last edition of Story on Contracts (§ 722) represents the statute of Anne

(12 Ann. stat. 2, c. 16) as still regulating the law of interest in England. * As to securities given after repeal of usury laws for money lent on usurious terms before the repeal, *Flight v. Reed*, 1 H. & C. 703, 32 L. J. Ex. 265.

Wagers. 8 & 9 Vict. c. 109, *supra*, p. 265. Benjamin on Sale, 435. As to the extent of the exceptions, *Parsons v. Alexander*, 5 E. & B. 263, 24 L. J. Q. B. 277, *Coombes v. Dibble*, L. R. 1 Ex. 248, *Diggle v. Higgs*, 2 Ex. D. 422. Forbearance of proceedings to enforce payment of racing debts by purely conventional sanctions is not an unlawful consideration; *qu.* whether or not a good consideration; *Bubb v. Felverton*, 9 Eq. 471.

Wages. Payment otherwise than in money forbidden, 1 & 2 Wm. 4, c. 37 (Truck Act), in the trades enumerated in s. 19. *Cutts v. Ward*, L. R. 2 Q. B. 357. The stoppage of wages for frame rents &c. in the hosiery manufacture is forbidden, and all contracts to stop wages and contracts for frame rents and charges are made illegal null and void, by 37 & 38 Vict. c. 48. See *Willis v. Thorp*, L. R. 10 Q. B. 383.

Weights and Measures. Standards defined, and use of other weights and measures forbidden. 5 Geo. 4. c. 74, 5 & 6 Wm. 4, c. 63, 18 & 19 Vict. c. 72, 22 & 23 Vict. c. 56. The use of the metric system is legalized by 27 & 28 Vict. c. 117. Sales by customary weights or measures which are well known multiples of standard weight or measure are not unlawful: *Hughes v. Humphreys*, 3 E. & B. 954, 23 L. J. Q. B. 356, *Jones v. Giles*, 10 Ex. 119, 23 L. J. Ex. 292.

APPENDIX D.

Indian Contract Act, ss. 23, 24, 26, 27, 28, 30, 57, 58.

Indian
Contract
Act.

[It is thought unnecessary to set out here the illustrations, of which there are several, to s. 23, as the cases put are sufficiently obvious. It must be remembered, however, that the illustrations are an integral part of the enactment. None is given on the head of public policy, whether from a desire not to limit judicial discretion or from the difficulties attending the subject: so that the courts are apparently left to fall back upon the English authorities. The sections or clauses which distinctly differ from the corresponding English law are marked with an asterisk.]

23. The consideration or object of an agreement is lawful unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy.

In each of these cases, the consideration or object of an agreement

is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void.

Illustration.

A. promises to superintend, on behalf of B., a legal manufacture of indigo and an illegal traffic in other articles. B. promises to pay to A. a salary of 10,000 rupees a year. The agreement is void, the object of A's promise, and the consideration for B's promise, being in part unlawful.

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1. One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits,* so long as the buyer, or any person deriving title to the good-will from him carries on a like business therein,* provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Exception 2. Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceding exception.

Exception 3. Partners may agree that some one or all of them will not carry on any business other than that of the partnership, during the continuance of the partnership.

28. Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Exception 1. This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects, shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

* When such a contract has been made a suit may be brought for its specific performance, and if a suit other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect

of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Exception 2. Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

30. Agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize, or sum of money * of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race *.

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing to which the provisions of section 294 A. of the Indian Penal Code apply.

57. Where persons reciprocally promise, firstly to do certain things which are legal, and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Illustration.

A. and B. agree that A. shall sell B. a house for 10,000 rupees, but that if B. uses it as a gambling house, he shall pay A. 50,000 rupees for it.

The first set of reciprocal promises, namely to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B. may use the house as a gambling house, and is a void agreement.

58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration.

A. and B. agree that A. shall pay B. 1,000 rupees, for which B. shall afterwards deliver to A. either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

CHAPTER VII.

IMPOSSIBLE AGREEMENTS.

Perform-
ance of
agreement
may be
impossible
in itself
(logically
or phy-
sically).

AN agreement may be impossible of performance at the time when it is made, and this in various ways.

It may be impossible in itself; that is, the agreement itself may involve a contradiction, as if it contains promises inconsistent with one another or with the date of the agreement. Or the thing contracted for may be contrary to the course of nature, "*quod natura fieri non concedit*" (a).

As if a man should undertake to make a river run up hill; to make two spheres of the same substance, but one twice the size of the other, of which the greater should fall twice as fast as the smaller when they were both dropped from a height; or to construct a perpetual motion (b).

By law
(incon-
sistent
with legal
principle,
&c.)

It may be impossible by law, as being inconsistent with some legal principle or institution.

As in the cases already considered in Chap. V. of attempts to enable a stranger to a contract to sue upon it by agreement of the parties; or as if a man should give a bond to secure a simple contract with a collateral agreement that the simple contract debt should not be merged (c), or should covenant to create a new manor (d). Again, it is the general rule of law that a man may contract for the sale of a specific thing which is not his own at

(a) D. 45. 1. de v. o. 35 pr.

(b) Of these particular impossibilities the second was supposed to be an elementary fact before Galileo made the experiment; the last continues to be now and then attempted by persons who know mechanical

handicraft without mechanical principles: we choose the examples as all the more instructive on that account.

(c) See *Owen v. Homan*, 3 Mac. & G. 378, 407-411.

(d) And see Leake 359.

the time. But if the thing be already the buyer's own, or cannot be the subject of private ownership at all (as the site of a public building, the Crown jewels, a ship in the Royal Navy), the agreement is impossible in law.

It may be impossible in fact by reason of the existence of a particular state of things which makes the performance of the particular contract impossible. As where the contract is to go to a certain island and there load a full cargo of guano, but there is not enough guano there to make a cargo (a) : or a lessee covenants to dig not less than 1,000 tons of a certain kind of clay on the land demised in every year of the term, but there is no such clay on the land (b).

In fact (inconsistent with particular state of facts existing at the time).

Moreover the performance of a contract which was possible in its inception may become impossible in either the second or third of these ways. The authorities are in a somewhat fluctuating condition, and perhaps not wholly consistent. But the strong and concurrent tendency of the later cases is to avoid laying down absolute rules, and to give effect as far as possible to the real intention of the parties—in other words, to treat the subject as one to be governed by rules of construction rather than by rules of law. And by this means they have done much to clear up and simplify the matter for practical purposes, though a formally accurate statement of the law may be difficult to extract from them. Before proceeding to any details we may at once give an outline of the results.

Or may become impossible in law or in fact. According to modern authorities the rules are rules of construction.

1. An agreement is void if the performance of it is either impossible in itself or impossible by law.

General statement.

When the performance of an agreement becomes impossible by law, the agreement becomes void.

2. An agreement is not void merely by reason of the performance being impossible in fact, nor does it become void by the performance becoming impossible in fact without the default of either party, unless according to the true intention of the parties the agreement was conditional on the performance of it being or continuing possible in fact.

Such an intention is presumed where the performance of the

(a) *Hills v. Sughrue*, 15 M. & W. 258.

(b) *Clifford v. Watts*, L. R. 5 C. P. 577.

contract depends on the existence of a specific thing, or on the life or health of any person.

3. If the performance of any promise becomes impossible in fact by the default of the promisee, the promisor is discharged, and the promisee is liable to him under the contract for any loss thereby resulting to him.

If it becomes impossible by the default of the promisor, the promisor is liable under the contract for the non-performance.

1. Agree-
ment im-
possible in
itself is
void: but
even this is
probably a
rule of con-
struction:
an im-
possibility,
which the
parties as
reasonable
men
must be
presumed
to know,
excluding
*animus
contra-
hendi*.

1. On the first and simplest rule—that an agreement impossible in itself is void—there is little or no direct authority, for the plain reason that such agreements do not occur in practice; but it is always assumed to be so. Perhaps even this rule is not accurately stated as an absolute one. There is reason to think the ground of it is this, that the impossible nature of the promise shows that there was no real intention of contracting and therefore no real agreement. It would thus be reduced to a rule of construction or presumption only, though a strong one. Brett, J. said in *Clifford v. Watts* (a): “I think it is not competent to a defendant to say that there is no binding contract, merely because he has engaged to do something which is physically impossible. I think it will be found in all the cases where that has been said, that the thing stipulated for was, according to the state of knowledge of the day, so absurd that the parties cannot be supposed to have so contracted.” The same view is also distinctly given in the Digest (b). It seems to follow then that the question is not whether a thing is absolutely impossible (a question not always without difficulty), but whether it is such that reasonable men in the position of the parties must treat it as impossible.

A thing is
not im-
possible
because
not known

On the other hand a thing is not to be deemed impossible merely because it has never yet been done, or is not known to be possible. “Cases may be conceived,” says Willes, J. in the case last cited, “in which a man may undertake to do that which turns out to

(a) L. R. 5 C. P. p. 588.

(b) D. 44. 7 de obl. et act. 31.
Non solum stipulationes . . . sed
etiam ceteri quoque contractus . . .
impossibili conditione interposita
aeque nullius momenti sunt, quia
in ea re, quae ex duorum pluriumve

consensu agitur, omnium voluntas
spectetur; quorum procul dubio in
huiusmodi actu talis cogitatio est,
ut nihil agi existiment apposita ea
conditione quam sciant esse impos-
sibilem.

be impossible, and yet he may still be bound by his agreement. ^{to be possible:} I am not prepared to say that there may not be cases in which a man may have contracted to do something which in the present state of scientific knowledge may be utterly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the non-performance, and cannot set up by way of defence that the thing was impossible." Indeed many things have become possible which were long supposed to be impossible; and this not only in the well-known instances of mechanical invention and the applications of scientific discovery to the arts of life, but in the regions of pure science and mathematics (a). Fifty years ago it seemed impossible that we should ever have direct evidence of the physical constitution of the sun and fixed stars: we now have much.

It is submitted, nevertheless, that the doctrine of the foregoing dicta must be limited to cases where it may be within the serious contemplation of a reasonable man at the time that the thing may somehow be done. For example, a man agrees to make a flying machine and warrants that it shall fly. This may well be a good contract. It is true that no one has yet succeeded in making such a machine. But the difficulties, great as they are, consist in details; it is a question of weight and strength of materials, disposition of parts, and application of power; and these obstacles differ not in kind from such as have already been overcome in other quarters by the progress of mechanical invention and workmanship. Suppose again, that a man agrees to make a flying machine and fly to the moon with it. Now this involves an undertaking either to live in interplanetary space, which is absolutely impossible, or to make a habitable atmosphere between the earth and the moon, which is likewise impossible, though not precisely in the same manner. It is surely needless to put the question whether any court could regard such an agreement as valid, even though the parties were so ignorant as to believe it possible.

This last qualification—*viz.* that the parties must be presumed

(a) Mr. Sylvester and M. Peau-cellier respectively have lately resolved certain algebraical and geometrical problems long thought

insoluble, and which in the latter case an eminent mathematician had even spent much time in trying to prove insoluble.

to have the ordinary knowledge of reasonable men, even if the whole thing is treated as a question of intention—is obviously required by convenience, and is contained by implication in the Indian Contract Act (s. 56, illust. *a*), which says that an agreement to discover treasure by magic is void. In some regions at least of British India the parties might really believe in the efficacy of magic for the purpose.

“Practical impossibility,” i.e. extreme cost or difficulty, not material.

It has been said by a writer entitled to great respect that “practical impossibility is placed on the same footing in law with absolute impossibility :” where “practical impossibility” means that the thing can be done, but only at an excessive or unreasonable cost (*a*). This, no doubt, is true for some purposes ; a ship is said to be totally lost when it is in this sense practically impossible, though not physically impossible, to repair her, as appears by the context of the dictum cited by Mr. Leake (*b*). But the proposition cannot be relied on as true for the purposes of the matter now in hand, at any rate since the judicial statements above quoted. If a man may bind himself to do something which is only not known to be impossible, much more can he bind himself to do something which is known to be possible, however expensive and troublesome. Indeed one or two recent dicta seem to go even farther, but probably must be taken as limited to what we here call impossibility in fact (*c*).

Logical impossibility. Repugnant promises: repugnancy between date and contents of instrument. In most cases only apparent, and does

The other conceivable cases of absolute impossibility may be very briefly dismissed. Inconsistent or, in the usual technical phrase, repugnant promises contained in the same instrument cannot of course be enforced : this however is rather a case of failure of that certainty which, as we saw in the first chapter, is one of the primary conditions for the formation of a contract. There may also be a repugnancy as to date, as if a man promises to do a thing on a day already past. Practically, however, such a repugnancy can hardly be more than apparent. Either it is a mere clerical or verbal error, in which case the Court may correct it by the context (*d*), or it arises from the terms of the agreement

(*a*) Leake on Contracts, 357.

(*b*) *Moss v. Smith*, 9 C. B. 94, 103.

(*c*) See per Mellor, J. L. R. 6 Q. B. 123, per Hannen, J. *ib.* 127.

(*d*) See *Pitch v. Jones*, 5 E. & B. 238, 24 L. J. Q. B. 293, where a note payable two months after date,

and made in January, 1855, was dated by mistake 1854, but across it was written “due the 4th March, 1855.” The Court held that this sufficiently corrected the mistake, and might be taken as a direction to read 5 for 4.

being fixed before and with reference to a certain time but not reduced into writing and executed as a written contract till afterwards. In such a case it must be determined on the circumstances and construction of the contract whether the stipulation as to time is to be treated as having ceased to be part of the contract (in other words, as having been left in the statement of the contract by a common mistake), or as still capable of giving an independent right of action. At all events it cannot be treated as a condition precedent so as to prevent the rest of the contract from being enforced (a).

Leaving, however, this rather barren discussion, we come to a qualification, or rather explanation, of more practical importance, which follows *a fortiori* from the principle laid down by Willes, J. Difficulty, inconvenience, or impracticability arising out of circumstances merely relative to the promisor will not excuse him. "A person incurring a debt may be, or may become, unable to pay it for want of money : but he is not on that account excused from his contract" (b). Savigny states the civil law to the same effect. "Impossibility may consist either in the nature of the action in itself, or in the particular circumstances of the promisor. It is only the first, or objective kind of impossibility that is recognized as such by law. The second, or subjective kind, cannot be relied on by the promisor for any purpose, and does not release him from the ordinary consequences of a wilful non-performance of his contract. On this last point the most obvious example is that of the debtor who owes a sum certain but has neither money nor credit. There is plenty of money in the world, and it is a matter wholly personal to the debtor if he cannot get the money he has bound himself to pay" (c). Therefore a man is not excused who chooses to make himself answerable for the acts or conduct of third persons, though beyond his control ; or even, it seems, for a contingent event in itself possible and ordinary but beyond the control of man. It has been said that a covenant that it shall rain to-morrow might be good (d), and that "if a man is bound

not avoid
the
contract.

Promisor
not ex-
cused by
relative im-
possibility,
i.e. not
having the
means of
perform-
ance.

One may
warrant
acts of
third per-
sons, or
natural
event in
itself
possible.

(a) *Hall v. Cazenove*, 4 East 477, where the Court agreed to this extent, but differed on the other question.

(b) *Leake* 369.

(c) *Sav. Obl.* 1. 384.

(d) By Maule, J. *Canham v. Barry*,

15 C. B. at p. 619, 24 L. J. C. P. at p. 106. Per Cur. *Baily v. De Crespigny*, L. R. 4 Q. B. at p. 185. But *qu.* would not such a contract be a mere wager in almost any conceivable circumstances?

to another in 20*l.* on condition *quod pluvia debet pluerē cras*, there *si pluvia non pluit cras* the obligor shall forfeit the bond, though there was no default on his part, for he knew not that it would not rain. In like manner if a man is bound to me on condition that the Pope shall be here at Westminster to-morrow, then if the Pope comes not there is no default on the defendant's part, and yet he has forfeited the obligation" (a). "Generally if a condition is to be performed by a stranger and he refuses, the bond is forfeit, for the obligor took upon himself that the stranger should do it" (b). "If the condition be that the obligor shall ride with I. S. to Dover such a day, and I. S. does not go thither that day; in this case it seems the condition is broken, and that he must procure I. S. to go thither and ride with him at his peril" (c). Where the condition of a bond was to give such a release as by the Court should be thought meet, it was held to be the obligor's duty to procure the judge to devise and direct it (d). If a lessee agrees absolutely to assign his lease, the lease containing a covenant not to assign without licence, the contract is binding and he must procure the lessor's consent (e). But on the sale of shares in a company, on the Stock Exchange at all events, the vendor is not bound to procure the directors' assent, though it may be required to complete the transfer (f), and it seems at least doubtful whether he is so bound in any case (g).

Agree-
ment im-
possible in
law is void.

Where an agreement is impossible by law there is no doubt that it is void: for example, a promise by a servant to discharge a debt due to his master is void, and therefore no consideration for a reciprocal promise (h); though, by the rule last stated, a promise to procure his master to discharge it would (in the absence of any fraudulent intention against the master) be good and binding. And when the performance of a contract becomes wholly or in part impossible by law, the contract is to that

(a) Per Brian, C. J., Mich. 22 Ed. 4. 26. The whole discussion there is curious, and well worth perusal in the book at large.

(b) Ro. Ab. 1. 452, L, pl. 6.

(c) Shepp. Touchst. 392.

(d) Lamb's ca. 5 Co. Rep. 23 b.

(e) Lloyd v. Crispe, 5 Taunt. 249, cp. Canham v. Barry, 15 C. B. 597, and see other cases in Leake, 370.

(f) Stray v. Russell, Q. B. and Ex. Ch. 1 E. & E. 888, 916, 28 L. J. Q. B. 279, 29 L. J. Q. B. 115.

(g) Lindley, 1. 732, not allowing Wilkinson v. Lloyd, 7 Q. B. 27, to be now law.

(h) Harvey v. Gibbons, 2 Lev. 161. It is called an *illegal* consideration, but such verbal confusions are constant in the early reports.

extent discharged. The best as well as the latest instance of this is *Baily v. De Crespigny* (a). There a lessor covenanted with the lessee that neither he nor his heirs nor his assigns would allow any building (with certain small exceptions) on a piece of land of the lessor's fronting the demised premises. Afterwards a railway company purchased this piece of land under the compulsory powers of an Act of Parliament, and built a station upon it. The lessee sued the lessor upon his covenant; but the Court held that he was discharged by the subsequent Act of Parliament, which put it out of his power to perform it. And this was agreeable to the true intention, for the railway company coming in under compulsory powers, "whom he [the covenantor] could not bind by any stipulation, as he could an assignee chosen by himself," was "a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into." Nor was it material that the company was only empowered by Parliament, not required, to build a station at that particular place (b). If a subsequent Act of Parliament making the performance of a contract impossible were a private Act obtained by the contracting party himself, he might perhaps remain bound by his contract as if he had made the performance impossible by his own act (of which afterwards): but where the Act is a public one, its effect in discharging the contract cannot be altered by showing that it was passed at the instance of the party originally bound (c).

When performance becomes impossible by law, promisor is excused. *Baily v. De Crespigny*.

The principles we have just now considered are very well brought together in the Digest, in a passage from a work of Venuleius on Stipulations. "Illud inspiciendum est, an qui centum dari promisit confestim teneatur, an vero cesset obligatio donec pecuniam conferre posset. Quid ergo si neque domi habet neque inveniat creditorem? Sed haec recedunt ab impedimento naturali et respiciunt ad facultatem dandi (d). . . . Et generaliter causa difficultatis ad incommodum promissoris, non ad impedimentum stipulatoris pertinet [i.e. inconvenience short of impossibility is no answer]. . . . Si ab eo stipulatus sim, qui

Exposition of same principles in Roman law.

(a) L. R. 4 Q. B. 180.

(b) L. R. 4 Q. B. 186-7.

(c) *Brown v. Mayor of London*, 9 C. B. N. S. 726, 30 L. J. C. P. 225, in Ex. Ch. 13 C. B. N. S. 828,

31 L. J. C. P. 280.

(d) For the explanation of a not very clear illustration which follows here, and is omitted in our text, see Sav. Obl. 1. 385.

efficere non possit, cum alii possibile sit, iure factam obligationem Sabinus scribit." He goes on to say that a legal impossibility, *e.g.* the sale of a public building, is equivalent to a natural impossibility. . . . "Nec ad rem pertinet quod ius mutari potest et id quod nunc impossibile est postea possibile fieri; non enim secundum futuri temporis ius sed secundum praesentis aestimari debet stipulatio" (a): (as if it should be contended that a covenant to create a new manor is not a covenant for a legal impossibility, because peradventure the statute of *Quia Emptores* may be repealed.) All this is in exact accordance with English law.

2. Performance impossible in fact: no excuse where contract is absolute.

A fortiori where only inconvenient or impracticable.

2. We now come to the cases where the performance of an agreement is not impossible in its own nature, but impossible in fact by reason of the particular circumstances. It is a rule admitted by all the authorities, and supported by positive decisions, that impossibility of this kind is no excuse for the failure to perform an unconditional contract, whether it exists at the date of the contract, or arises from events which happen afterwards (b). Thus an absolute contract to load a full cargo of guano at a certain island was not discharged by there not being enough guano there to make a cargo (c): and where a charter-party required a ship to be loaded with usual despatch, it was held to be no answer to an action for delay in loading that a frost had stopped the navigation of the canal by which the cargo would have been brought to the ship in the ordinary course (d). Still less will unexpected difficulty or inconvenience short of impossibility serve as an excuse. Where insured premises were damaged by fire and the insurance company, having an option to pay in money or reinstate the building, elected to reinstate, but before they had done so the whole was pulled down by the authority of the Commissioners of Sewers as being in a dangerous condition; it was held that the company were bound by their election, and the performance of the

(a) D. 45. 1. de v. o. 137. §§ 4-6.

(b) *Atkinson v. Ritchie*, 10 East 530.

(c) *Hills v. Sughrue*, 15 M. & W. 253. But *qu.* if this case would now be so decided. It seems really to fall within the rule in *Taylor v. Caldwell* (p. 362 below).

(d) *Kearon v. Pearson*, 7 H. & N. 386, 31 L. J. Ex. 1. So where a given number of days is allowed to the charterer for unloading, he is held to take the risk of any ordinary vicissitudes which may cause delay: *Thiss v. Byers*, 1 Q. B. D. 244.

contract as they had elected to perform it was not excused (a). So again if a man contracts to do work according to orders or specifications given or to be given by the other contracting party, he is bound by his contract, although it may turn out not to be practicable to do the work in the time or manner prescribed. In *Jones v. St. John's College (Oxford)* (b) the plaintiffs contracted to erect certain farm buildings according to plans and specifications furnished to them, together with any alterations or additions within specific limits which the defendants might prescribe, and subject to penalties if the work were not finished within a certain time. And they expressly agreed that alterations and additions were to be completed on the same conditions and in the same time as the works under the original contract, unless an extension of time were specially allowed. It was held that the plaintiffs, having contracted in such terms, could not avoid the penalties for non-completion by showing that the delay arose from alterations being ordered by the defendants which were so mixed up with the original work that it became impossible to complete the whole within the specified time. In *Thorn v. Mayor of London* (c) a contractor undertook to execute works according to specifications prepared by the engineer of the corporation. It turned out that an important part of the works could not be executed in the manner therein described, and after fruitless attempts in which the plaintiff incurred much expense, that part had to be executed in a different way. It was held that no warranty could be implied on the part of the corporation that the plans were such as to make the work in fact reasonably practicable, and that the plaintiff could not recover as on such a warranty the value of the work that had been thrown away. The judgments in the House of Lords leave it an open question whether, assuming the extra work thus caused not to have been extra work of the kind contemplated by the contract itself and to be paid for under it, the plaintiff might not have recovered for it as on a *quantum meruit*. In short, it is admitted law that generally where there is a positive

(a) *Brown v. Royal Insurance Co.*
1 E. & E. 853, 28 L. J. Q. B. 275,
diss. Erle, J. who thought such a
reinstatement as was contemplated
by the contract (not being an entire
rebuilding) had become impossible

by the act of the law.

(b) L. R. 6 Q. B. 115, 124.

(c) L. R. 9 Ex. 163, in Ex. Ch.
10 Ex. 112, affd. in H. L. 1 App.
Ca. 120.

contract to do a thing not in itself unlawful, the contractor must perform it, or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible (a).

Prohibition by foreign law = impossibility in fact.

Where the performance of a contract becomes impracticable by reason of its being forbidden by a *foreign* law, it is deemed to have become impossible not in law but in fact. In *Barker v. Hodgson* (b) intercourse with the port to which a ship was chartered was prohibited on account of an epidemic prevailing there, so that the freighter was prevented from furnishing a cargo; but it was held that this did not dissolve his obligation. So if the goods are confiscated at a foreign port, that is no answer to an action against the shipowner for not delivering them (c).

Obligation of tenant to pay rent though premises accidentally destroyed. No impossibility here;

Certain cases, of which *Paradine v. Jane* (d) is the leading one, are often referred to upon this head. The effect of them is that the accidental destruction of a leasehold building, or the tenant's occupation being otherwise interrupted by inevitable accident, does not determine or suspend the obligation to pay rent either at law or in equity (e). In these cases, however, the performance of the contract does not really become impossible. There is obviously nothing impossible in the relation of landlord and tenant continuing with its regular incidents. We must be careful not to lose sight of the two distinct characters of a lease as a contract (or assemblage of contracts) and as a conveyance. There is a common misfortune depriving both parties to some extent of the benefit of their respective interests in the property; not of the benefit of the contract, for so far as it is a matter of contract, neither party is in a legal sense disabled from performing any material part of it. The expense of getting housed elsewhere, or the loss of profits from a business carried

(a) *Taylor v. Caldwell*, 3 B. & S. 826, 833, 32 L. J. Q. B. 164, 166. This rule does not extend, however, beyond express contracts. An undertaking to be answerable for delay caused by *vis major* cannot be made part of an implied contract: *Ford v. Cotesworth* (Ex. Ch.) L. R. 5 Q. B.

544.

(b) 3 M. & S. 267.

(c) *Spence v. Chodwick*, 10 Q. B. 517.

(d) *Aleyn* 26.

(e) *Leeds v. Cheetham*, 1 Sim. 146, *Lofft v. Dennis*, 1 E. & E. 474, 28 L. J. Q. B. 168.

on upon the premises, may render it difficult or even impracticable for the tenant to go on paying rent. But it does not render the payment of his rent impossible in any other sense than it renders the payment of any other debt to any other creditor impossible (a). It is a personal and relative "causa difficultatis" ; which, as we have seen, is irrelevant in a legal point of view. The lessee's special covenants, if such there be, to paint the walls at stated times or the like, do become impossible of performance by the destruction of their subject-matter, and to that extent, no doubt, are discharged or suspended as being within the rule in *Taylor v. Caldwell*, which we shall immediately consider. Only to this limited extent is there any precise resemblance to the wider class of cases where the performance of a contract becomes in fact impossible. The true analogy is in the nature of the question which the rule of law has to decide: namely whether the contract is in substance and effect as well as in terms unconditional and without any implied exception of inevitable accident. We shall see that this is always the real question. The answer being here determined by *Paradine v. Jane* (b), it was held in the later cases (c) (about which difficulties are sometimes felt, but it is submitted without solid reason) that it is not affected by the landlord having protected himself by an insurance, which is a purely collateral contract of indemnity. There might indeed very well be a further collateral agreement between the landlord and tenant that the landlord should apply the insurance moneys to rebuilding the premises. Such an agreement would be good without any new consideration on the tenant's part beyond his acceptance of the lease, and probably without being put into writing (d). On the other hand it is often a term of the lease that the tenant shall keep the premises insured and that in case of fire the insurance moneys shall be applied in reinstatement. There, if the landlord has insured separately without the knowledge of the tenant, so that the damage is apportioned between the two policies, and the amount received by the tenant is di-

but a similar question, viz. whether the contract is really unconditional.

(a) See per Lord Blackburn, 2 App. Ca. 770.

(b) Aleyn 26.

(c) *Leeds v. Cheetham*, 1 Sim. 146, *Lofft v. Dennis*, 1 E. & E. 474, 28 L. J. Q. B. 168.

(d) Parol collateral agreements have been held good in *Erskine v. Adeane*, 8 Ch. 756, *Morgan v. Griffith*, L. R. 6 Ex. 70, *Angell v. Duke*, L. R. 10 Q. B. 174.

minated, the tenant is entitled to the benefit of the other policy also (a).

Contra the civil law.

The rule or presumption might, of course, be the other way, as it is by the civil law, where it is an incident of the contract to pay rent that it is suspended by inevitable accident destroying or making useless the thing demised. The particular event on which *Paradine v. Jane* was decided, eviction by alien enemies (b), is expressly dealt with in this manner. The law of Scotland follows the civil law (c). Either way the rule is subject to any special agreement of the parties, and it is but a question which, in the absence of such agreement, is the better distribution of the hardship that must to some extent fall upon both. It is hard for a tenant, according to the English rule, to pay an occupation rent for a burnt out plot of ground. It is hard for a landlord, according to the Roman and Scottish rule, to lose the rent as well as (it may be) a material part of the value of the reversion. Either party may be insured; but that, as we have said, is not of itself relevant as between them.

Exceptions in certain cases of subsequent impossibility.

So far the general rule. The nature of the exceptions is thus set forth by the judgment of the Court in *Baily v. De Crespigny* :—

“ There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor.

But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the act of God is in

(a) *Reynard v. Arnold*, 10 Ch. 386.

(b) Si incursus hostium fiat, D. 19. 2. locati conducti, 15 § 2; or even reasonable fear of it: Si quis timoris causa emigrasset . . . respondit, si causa fuisset cur periculum

timeret, quamvis periculum vere non fuisset, tamen non debere mercedem; sed si causa timoris iusta non fuisset, nihilominus debere, D. *cod. tit.* 27 § 1.

(c) Per Lord Campbell, *Lofft v. Dennis*, *supra*.

some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract" (a).

This (as well as the following context, which is too long to quote) well shows the modern tendency, to which we have already called attention, to reduce all the rules on this subject to rules of construction. By the modern understanding of the law we are not bound to seek for a general definition of "the act of God" or *vis major* (b), but only to ascertain what kind of events were within the contemplation of the parties, including in the term event an existing but unascertained state of facts. This is yet more apparent if one attempts to frame any definition of the term "act of God." It does not include every inevitable accident; contrary winds, for example, are not within the meaning of the term in a charter-party. Nor is the reason far to seek; the risk of contrary winds, though inevitable, is one of the ordinary risks which the parties must be understood to have before them and to take upon them in making such a contract: therefore it is said that the event must be not merely accidental, but overwhelming (c). But on the other hand the term is not confined to unusual events: death, for example, is an "act of God" as regards contracts of personal service, because in the particular case it is not calculable. Yet the fact that this very event is not only certain to happen, but on a sufficiently large average is calculable, is the foundation of the whole system of life annuities and life insurance. Again, death is inevitable sooner or later, but may be largely prevented as to particular causes and occasions. The effects of tempest or of earthquake may be really inevitable by any precaution whatever. But fire is not inevitable in that sense. Precautions may be taken both against its breaking out and for extinguishing it when it does break out. We cannot arrive, then, at any more distinct conception than this: An event which, *as between the parties and for the purpose of the matter in*

Events not within the contemplation of the contract.

(a) L. R. 4 Q. B. 185.

(b) Both these terms are classical: "Vis maior, quam Graeci θεός βλασ appellant." Gaius in D. 19. 2. locati

25 § 6.

(c) Per Martin, B. *Oakley v. Portsmouth & Ryde Steam Packet Co.* 11 Ex. 618.

hand, cannot be definitely foreseen or controlled. In other words, we are thrown back upon the nature and construction of the particular contract (*a*).

We may now proceed to the specific classes of exceptional cases.

(*a*) Where the performance depends on the existence of a specific thing.
Taylor v. Caldwell.

Implied condition that further performance is excused if the thing perishes without the party's own default.

a. Where the performance of the contract depends on the existence of a specific thing. The law was settled on this head by *Taylor v. Caldwell* (*b*), where the defendants agreed to let the plaintiffs have the use (*b*) of the Surrey Gardens and Music Hall on certain days for the purpose of giving entertainments. Before the first of those days the music-hall was destroyed by fire so that the entertainments could not be given, and without the fault of either party. The Court held that the defendants were excused, and laid down the following principle: "Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there in the absence of any express or implied (*c*) warranty that the thing shall exist, the contract is not to be considered a positive contract, but subject to the implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." And the following authorities and analogies were relied upon:—

The civil law, which implies such an exception in all cases of obligation *de certo corpore*. (D. 45. 1. de v. o. 23, 33 (*d*):

(*a*) As to what is such an "act of God" as will make an exception to a duty imposed not specially by contract but by the general law, see *Nichols v. Marsland*, 2 Ex. D. 1, *Nugent v. Smith*, 1 C. P. D. 423, 444, both in C. A.

(*b*) 3 B. & S. 826, 32 L. J. Q. B. 164. There were words sufficient for an actual demise, but the Court held that the manifest general intention prevailed over them.

(*c*) That is, understood in fact between the parties: the whole scope of the passage being that it is not to be implied by law.

(*d*) Cp. also D. 46. 3. de solut. 107. Verborum obligatio aut naturaliter resolvitur aut civiliter; naturaliter, veluti solutione, aut cum res in stipulationem deducta sine culpa promissoris in rebus humanis esse desiit.

Pothier, Obl. § 149, *ib.* Part 3, ch. 6, §§ 649, *sqq.*, and *Contrat de Vente*, § 308, *sqq.* translated in Blackburn on Sale, 173.)

The cases of contractual rights or duties of a strictly personal nature which, though the contract is not expressly qualified, are by English law not transmissible to executors (see ch. V., p. 172, above).

The admitted rule of English law that where the property in specific chattels to be delivered at a future day has passed by bargain and sale, and the chattels perish meanwhile without the vendor's default, he is excused from performing his contract to deliver; and the similar rule as to loans of chattels and bailments. In all these cases, though the promise is in words positive, the exception is allowed "because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

The same principle was followed in *Appleby v. Meyers* (a). *Appleby v. Meyers.* There the plaintiffs agreed with the defendant to erect an engine and other machinery on his premises, at certain prices for the separate parts of the work, no time being fixed for payment. While the works were proceeding, and before any part was complete, the premises, together with the uncompleted works and materials upon them, were accidentally destroyed by fire. In the Common Pleas it was held that the plaintiffs might recover the value of the work already done as on a term to that effect to be implied in the nature of the contract. And in the court above authorities to the same effect were cited from the Digest and from modern French writers: these, however, were not discussed in the judgment, the Court merely observing that they were not binding. In the Exchequer Chamber the judgment of the Common Pleas was reversed. It was admitted that the work under the contract could not be done unless the defendant's premises continued in a fit state to receive it. It was also admitted that if the defendant had by his own default rendered the premises unfit to receive the work, the plaintiffs might have recovered the value of the work already done. But it was held that the court below were wrong in thinking that

(a) L. R. 2 C. P. 651, in Ex. Ch. revg. *s. c.* 1 C. P. 615.

there was an absolute promise or warranty by the defendant that the premises should at all events continue so fit. "Where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither." Another argument for the plaintiffs was that the property in the work done had passed to the defendant and was therefore at his risk (*a*). To this the Court answered that it was at least doubtful whether it had; and even if it had, the contract was still that nothing should be payable unless and until the whole work was completed.

Saving as to instalments of payment already earned.

Where there is an entire contract for doing work upon specific property, as fitting a steamship with new machinery, for a certain price, but the price is payable by instalments, and the ship is lost before the machinery has been delivered, but after one or more of the instalments has been paid, the further performance of the contract is excused, but the money already paid, though on account not of a part, but of the entire contract, cannot be recovered back (*b*).

Contract for future specific product.

The same doctrine has been applied where the subject-matter of the contract is a future specific product or some part of it. In March A. agreed to sell and B. to purchase 200 tons of potatoes grown on certain land belonging to A. In August the crop failed by the potato blight, and A. was unable to deliver more than 80 tons: the Court held that he was excused as to the rest. "The contract was for 200 tons of a particular crop in particular fields" . . . "not 200 tons of potatoes simply, but 200 tons off particular land" . . . "and therefore there was

(*a*) In the case cited in argument from Dalloz, Jurisp. Gén. 1861, pt. 1. 105, *Chemin de fer du Dauphiné v. Clet*, where railway works in course of construction had been spoilt by floods, the Court of Cassation relied on the distinction that they were not such as remained in the contractor's disposition till the whole was finished, but "de constructions dont les matériaux et la main d'œuvre étaient fournis par l'entrepreneur et qui s'incorporaient

au sol du propriétaire," as excluding the application of articles 1788-1790 of the Code Civil, which lay down a rule similar to that of the principal case.

(*b*) *Anglo-Egyptian Navigation Co. v. Rennie*, L. R. 10 C. P. 271. It would seem the same on principle where the whole price is paid in advance. See Vangerow, Pand. 3. 234 sqq.; and the cases on contracts, personal service, and apprenticeship cited farther on.

an implied term in the contract that each party should be free if the crop perished" (a).

These are all cases of the performance becoming impossible by events which happen after the contract is made. But sometimes the same kind of impossibility results from the existence of a state of things not contemplated by the parties, and the performance is excused to the same extent and for the same reasons as if that state of things had supervened. Where indeed the impossibility consists in the absolute non-existence of the specific property or interest in property which is the subject-matter of the agreement, there, on principles independent of those now under consideration, the agreement is void as being grounded on a material mistake common to the parties: and this particular topic is therefore reserved for the following chapter, where we speak of Fundamental Error as preventing the formation of a true contract. There are some cases however which, although the line is difficult to draw, seem to fall more properly within the present division.

When a lessee under a mining lease covenants in unqualified terms to pay a fixed minimum rent, he is bound to pay it both at law (b) and in equity (c), though the mine may turn out to be not worth working or even unworkable. But it is otherwise with a covenant to work the mine or to raise a minimum amount. In the case in equity last referred to (c), where a coal mine was found to be so interrupted by faults as to be not worth working, it was said that the lessor might be restrained from suing on the covenant to work it on the terms of the lessee paying royalty on the estimated quantity of coal which remained unworked. A similar question was fully dealt with in *Clifford v. Watts* (d). The demise was of all the mines, veins, &c., of clay on certain land. There was no covenant by the lessee to pay any minimum rent, but there was a covenant to dig in every year of the term not less than 1000 tons nor more than 2000 tons of pipe or potter's clay. An action was brought by the lessor for breach of this covenant. Plea (e), to the effect that there was not at

Impossibility at date of contract from state of things not contemplated by parties.

Covenants to work mines, or to raise minimum amount.

Clifford v. Watts.

(a) *Howell v. Coupland*, L. R. 9 Q. B. 462, 466, affd. in C. A. 1 Q. B. D. 258, see per Cleasby, B. at p. 263.

(b) *Marquis of Bute v. Thompson*, 13 M. & W. 487.

(c) *Ridgway v. Sneyd*, Kay 627.

(d) L. R. 5 C. P. 577.

(e) It was pleaded as an equitable plea, but the Court treated the defence as a legal one.

the demise or since so much as 1000 tons of such clay under the lands, that the performance of the covenant had always been impossible, and that at the date of the demise the defendant did not know and had no reasonable means of knowing the impossibility. The Court held that upon the natural construction of the deed the contract was that the lessee should work out whatever clay there might be under the land, and the covenant sued on was only a subsidiary provision fixing the rate at which it should be worked. The tenant could not be presumed to warrant that clay should be found: and "the result of a decision in favour of the plaintiff would be to give him a fixed minimum rent when he had not covenanted for it" (a).

Analogous
effect of
express
exceptions
in com-
mercial
contracts.

In certain kinds of contracts, notably charter-parties, it is usual to provide by express exceptions for the kind of events we have been considering. It is not within our province to enter upon the questions of construction which arise in this manner, and which form important special topics of commercial law. However, when the exception of a certain class of risks is once established, either as being implied by law from the nature of the transaction, or by the special agreement of the parties, the treatment is very much the same in principle: and a few recent decisions may be mentioned as throwing light on the general law. Where the principal part of the contract becomes impossible of performance by an excepted risk, the parties are also discharged from performing any other part which remains possible, but is useless without that which has become impossible (b). It is a general principle that a contract is not to be treated as having become impossible of performance if by any reasonable construction it is still capable in substance of being performed (c): but on the other hand special exceptions are not to be laid hold of to keep it in force contrary to the real intention. Thus where the contract is to be performed "with all possible despatch," saving certain impediments, the party for

(a) Per Montague Smith, J. at p. 587. Cp. and dist. *Jervis v. Tomkinson*, 1 H. & N. 195, 26 L. J. Ex. 41, where the covenant was not only to get 2000 tons of rock salt per annum, but to pay 6d. a ton for every ton short, and the lessees knew

of the state of the mine when they executed the lease.

(b) *Geipel v. Smith*, L. R. 7 Q. B. 404, 411.

(c) *The Teutonia*, L. R. 4 P. C. 171, 182. Cp. *Jones v. Holm*, L. R. 2 Ex. 335.

whose benefit the saving is introduced cannot force the other to accept performance after a delay unreasonable in itself, though due to an excepted cause, if the manifest general intention of the parties is that the contract shall be performed within a reasonable time, if at all. The saving clause will protect him from liability to an action for the delay, but that is all: the other party cannot treat the contract as broken for the purpose of recovering damages, but he is not prevented from treating it as dissolved (a).

β. Where the performance of the contract depends on the life or health of a person. "All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death" (b). Conversely, if the master dies during the service, the servant is thereby discharged, and cannot treat the contract as in force against the master's personal representatives (c). The passage now cited goes on to suggest the extension of this principle to the case of the party becoming, without his own default, incapable of fulfilling the contract in his lifetime: "A contract by an author to write a book, or by a painter to paint a picture within a reasonable time would in my judgment be deemed subject to the condition that if the author became insane, or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death." This view, which obviously commends itself in point of reason and convenience, is strongly confirmed by *Taylor v. Caldwell* (*supra*, p. 362), where indeed it was recognized as correct, and it has since been established by direct decisions. In *Boast v. Firth* (d) a master sued the father of his apprentice on his covenant in the apprenticeship deed that the apprentice should serve him, the plaintiff, during all the term. The defence was that the apprentice was prevented from so doing by permanent illness arising

(β) Where performance depends on life or health of a person. Implied condition that the person shall remain alive and well enough for the purposes of the contract.

Boast v. Firth.

(a) *Jackson v. Union Marine Insurance Co.* in Ex. Ch. L. R. 10 C. P. 125, 144 sqq.

(b) Pollock, J. B. in *Hall v. Wright*, E. B. & E. at p. 793, 29

L. J. Q. B. at p. 51.

(c) *Farrow v. Wilson*, L. R. 4 C. P. 744.

(d) L. R. 4 C. P. 1.

Robinson
v. Davison.

The contract becomes void, not only voidable at option of party disabled. *Semble*, notice should be given to the other party.

after the making of the indenture. The Court held that "it must be taken to have been in the contemplation of the parties when they entered into this covenant that the prevention of performance by the act of God should be an excuse for non-performance" (a), and that the defence was a good one. In *Robinson v. Davison* (b) the defendant's wife, an eminent pianoforte player, was engaged to play at a concert. When the time came she was disabled by illness. The giver of the entertainment sued for the loss he had incurred by putting off the concert, and had a verdict for a small sum under a direction to the effect that the performer's illness was an excuse, but that she was bound to give the plaintiff notice of it within a reasonable time. The sum recovered represented the excess of the plaintiff's expenses about giving notice of the postponement to the public and to persons who had taken tickets beyond what he would have had to pay if notice had been sent him by telegraph instead of by letter. The Court of Exchequer upheld the direction on the main point. The reason was thus shortly put by Bramwell, B. "This is a contract to perform a service which no deputy could perform, and which in case of death could not be performed by the executors of the deceased: and I am of opinion that by virtue of the terms of the original bargain incapacity either of body or mind in the performer, without default on his or her part, is an excuse for non-performance" (c). The same judge also observed, in effect, that the contract becomes, not voidable at the option of the party disabled from performance, but wholly void. Here the player could not have insisted "on performing her engagement, however ineffectually that might have been" when she was really unfit to perform it. The other party's right to rescind has since been established by a direct decision (d). No positive opinion was expressed on the other point as to the duty of giving notice. But it may be taken as correct that it is the duty of the party disabled to give the earliest notice that is reasonably practicable. Probably notice reasonable in itself could not be required, for the disabling accident may be sudden and at the last moment, and the duty must be limited to cases

(a) Per Montague Smith, J. at p. 7.

(b) L. R. 6 Ex. 269.

(c) L. R. 6 Ex. at p. 277.

(d) *Poussard v. Spiers & Pond*, 1 Q. B. D. 410.

where notice can be of some use (a). It further appears from the case that the effect of an omission of this duty is that the contract remains in force for the purpose only of recovering such damage as is directly referable to the omission. The decision also shows, if express authority be required for it, that it matters not whether the disability be permanent or temporary, but only whether it is such as to prevent the fulfilment of the particular contract.

[1] the earlier and very peculiar case of *Hall v. Wright* (b) the question, after some critical discussion of the pleadings, which it is needless to follow, came to this : " Is it a term in an ordinary agreement to marry, that if a man from bodily disease cannot marry without danger to his life, and is unfit for marriage from the cause mentioned at the time appointed, he shall be excused marrying then ? " (c) or in other words : " Is the continuance of health, that is, of such a state of health as makes it not improper to marry," an implied condition of the contract ? (d) The Court of Exchequer Chamber decided by four to three that it is not, the court of Queen's Bench having been equally divided. The majority of the judges relied upon two reasons: that if the man could not marry without danger to his life, that did not show the performance of the contract to be impossible, but at most highly imprudent ; and that at any rate the contract could be so far performed as to give the woman the status and social position of a wife. It was not disputed that the contract was voidable at her option. " The man, though he may be in a bad state of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position so far as in his power, though he may be unable to fulfil all the obligations of the marriage state ; and it rests with the woman to say whether she will enforce or renounce the contract " (e). As to the first of these reasons, the question is not whether there is or not an absolute impossibility, but what is the true meaning of the contract ; and in this case the contract is of such a kind

Hall v. Wright:
anomalous
decision
on the
contract to
marry :
illness un-
fitting for
marriage
no excuse.

(a) Cp. the doctrine as to giving notice of abandonment to underwriters, *Rankin v. Potter*, L. R. 6 H. L. 83, 121, 157.

(b) E. B. & E. 746, 29 L. J. Q. B. 43.

(c) Per Bramwell, B. 29 L. J.

Q. B. 45.

(d) Per Pollock, C. B. *ib.* 52.

(e) The case is thus explained and distinguished by Montague Smith, J. in *Boast v. Firth*, L. R. 4 C. P. 8.

that one might expect the conditions and exceptions implied in strictly personal contracts to be extended rather than excluded. It has long been settled that the contract to marry is so far personal that executors, in the absence of special damage to the personal estate, cannot sue upon it (a). As to the second reason, it cannot be maintained, except against the common understanding of mankind and the general treatment of marriage by the law of England, that the acquisition of legal or social position by marriage is a principal or independent object of the contract. Unless it can be so considered, the reason cannot stand with the principle affirmed in *Geipel v. Smith* (b), that when the main part of a contract has become impossible of performance by an excepted cause, it must be treated as having become impossible altogether. The decision itself can be reviewed only by a court of ultimate appeal; but it is so much against the tendency of the later cases that it is now of little or no authority beyond the point actually decided, which for the obvious reasons indicated in some of the judgments is not at all likely to recur.

Rights
already
acquired
under the
contract
remain.

As we saw in the case of contracts falling directly within the rule in *Taylor v. Caldwell*, so in the case of contracts for personal service and the like the dissolution of the contract by subsequent impossibility does not affect any specific right already acquired under it. Where there is an entire contract of this kind for work to be paid for by instalments at certain times, any instalments which have become due in the contractor's lifetime remain due to his estate after the contract is put an end to by his death (c). In like manner where a premium has been paid for apprenticeship, and the master duly instructs the apprentice for a part of the term, and then dies, his executors are not bound to return the premium or any part of it as on a failure of consideration. So the court of Common Pleas lately held (d), dissenting from a decision the other way in the court of Chancery (e), which, however, cannot be taken as establishing a different rule of equity, or therefore one which under the Judicature Act must prevail. For, except

(a) *Chamberlain v. Williamson*, 2 M. & S. 408.

(b) L. R. 7 Q. B. 404.

(c) *Stubbs v. Holywell Ry. Co.* L. R. 2 Ex. 311.

(d) *Whincup v. Hughes*, L. R. 6 C. P. 78.

(e) *Hirst v. Tolson*, 2 Mac. & G. 134.

so far as it can be referred to the summary jurisdiction of the court over its own officers, that decision is founded on the supposition that a proportionate part of the premium was a debt *at law* (a).

Where an existing contract is varied or superseded by a subsequent agreement, and the performance of that agreement becomes impossible (*e.g.* by the death of a person according to whose estimate a sum is to be assessed) so that the parties are no longer bound by it, they will be remitted to the original contract if their intention can thereby be substantially carried out. At all events a party for whose benefit the contract was varied, and who but for his own delay might have performed it as varied before it became impossible, cannot afterwards resist the enforcement of the contract in its original form (b).

3. We now come to the case of a contract becoming impossible of performance by the default of either party.

Where the promisor disables himself by his own default from performing his promise, not only is he not excused (for which indeed authority would be superfluous) but his conduct is equivalent to a breach of the contract, although the time for performance may not have arrived, and even though in contingent circumstances it may again become possible to perform it (c). A default consisting in mere omission may have the same effect. Where an arbitrator awards that the defendant shall pay the plaintiff's taxed costs of a suit on a certain day, it is the defendant's business to have them taxed before that day, and it is no excuse that in fact he had not notice of the taxation in time to pay them at the time and place fixed by the award (d).

On the other hand, where the promisor is prevented from performing his contract or any part of it by the default or refusal of the promisee, the performance is to that extent excused; and moreover default or refusal is a cause of action on which the

Substituted contract becoming impossible of performance.

8. Impossibility by default of either party. Default of promisor no excuse, but = breach of contract.

Default of promisee discharges promisor, and may be treated

(a) 2 Mac. & G. at p. 189; and see the judgments of Bovill, C. J. and Willes, J. in *Whincup v. Hughes*.
(b) *Firth v. Midland Ry. Co.* 20 Eq. 100.

(c) See Leake on Contracts 851, 460; 1 Ro. Ab. 448, B.
(d) *Bigland v. Skelton*, 12 East 436.

as breach,
or makes
contract
voidable
at his
option.

promisor may recover any loss he has incurred thereby (*a*), or he may rescind the contract and recover back any money he has already paid under it (*b*). Default may consist either in active interruption or interference on the part of the promisee (*c*), or in the mere omission of something without which the promisor cannot perform his part of the contract (*d*).

Roberts
v. Bury
Commissioners,
&c.

The principle, in itself well settled, is illustrated by some recent cases. Where the failure of a building contractor to complete the works by the day specified is caused by the failure of the other parties and their architect to supply plans and set out the land necessary to enable him to commence the works, "the rule of law applies which exonerates one of the two contracting parties from the performance of a contract when the performance of it is prevented and rendered impossible by the wrongful act of the other contracting party" (*e*), and the other party cannot take advantage of a provision in the contract making it determinable at their option in the event of the contractor failing in the due performance of any part of his undertaking. So where it is a term of the contract that the contractor shall pay penalties for any delay in the fulfilment of it, no penalty becomes due in respect of any delay caused by the refusal or interference of the other party (*f*).

Cases of
appren-
ticeship.

In *Raymond v. Minton* (*g*) it was pleaded to an action of covenant against a master for not teaching his apprentice that at the time of the alleged breach the apprentice would not be taught, and by his own wilful acts prevented the master from teaching him. This was held a good plea, for "it is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught." An earlier and converse

(*a*) As in the familiar case of an action for non-acceptance of goods, for not furnishing a cargo, &c.; so with a special contract, *e.g.* *Roberts v. Bury Commissioners*, L. R. 4 C. P. 755, in Ex. Ch. 5 C. P. 310.

(*b*) *Giles v. Edwards*, 7 T. R. 181.

(*c*) 1 Ro. Ab. 453, N.

(*d*) Where a condition can be performed only in the obligee's presence, his absence is an excuse, 1 Ro. Ab. 457, U, pl. 1. A covenant

to make within a year such assurance as the covenantee's counsel shall devise is discharged if the covenantee does not tender an assurance within the year, *ib.* 446, pl. 12.

(*e*) *Roberts v. Bury Commissioners*, L. R. 5 C. P. 310, 329.

(*f*) *Holme v. Guppy*, 3 M. & W. 387, *Russell v. Da Bandeira*, 13 C. B. N. S. 149, 32 L. J. C. P. 68.

(*g*) L. R. 1 Ex. 244.

case is *Ellen v. Topp* (a), referred to by the reporters. There a master undertook to teach an apprentice several trades ; it was held that on his giving up one of them, and thus making the complete performance of his own part of the contract impossible, the apprentice was no longer bound to serve him in any. " If the master is not ready to teach in the very trade which he has stipulated [promised] to teach, the apprentice is not bound to serve." A case of the same sort is put by Choke, J. in the Year Book, 22 Ed. 4. 26, in a case from which one passage has already been given.

" If I am bound to Catesby [then another judge of the Common Pleas] that my son shall serve him for seven years, and I come with my son to Catesby, and offer my son to him, and he will not take him, there because there is no default on my part I shall not forfeit the bond. In like manner if he took my son and afterwards within the term sent him away, it is unreasonable that this should be a forfeiture."

Where a contract is in the alternative to do one of two things at the promisor's option, and one of them is impossible, the promisor is bound to perform that which is possible (b). We find the rule clearly stated in the Digest (c). Where one of two things contracted for in the alternative subsequently becomes impossible, it is a question of construction for which no positive rule can be laid down, whether according to the true intention of the parties the promisor must perform the alternative which remains possible, or is altogether discharged (d). It was held, indeed, in *Laughter's* case (e) that where the condition of a bond is for either of two things to be done by the obligor, and one of them becomes impossible by the act of God, he is not bound to perform the other. But this is to be accounted for by the peculiar treatment of bonds of which we shall speak presently, the right of election being part of the benefit of the condition, of which the obligor is not to be deprived. And even as to bonds the general proposition has been denied (d). In the absence of anything to show the intention in the particular case,

Alter-
native
contract.
Where one
thing
impossible,
the
possible
one must
be per-
formed.
Where one
becomes
impossible,
a question
of con-
struction.

(a) 6 Ex. 424, 442 ; 20 L. J. Ex. 241.

(b) *Da Costa v. Davis*, 1 B. & P. 242.

(c) Si ita stipulatus fuero : te sisti ; nisi steteris, hippocentaurum

dari ! proinde erit atque te sisti solummodo stipulatus essem. D. 45. 1. de v. o. 97 pr.

(d) *Barkworth v. Young*, 4 Drew. 1, 25. And see Leake, 872-3.

(e) 5 Co. Rep. 21 b.

the presumption should surely be the other way, namely that the promisor should lose his election rather than the promisee lose the whole benefit of the contract. Where either the promisor or the promisee, having the right under a contract to choose which of two things shall be done, chooses one which becomes impossible after the choice is determined, there (on authority as well as principle) it is the same as if there had been from the first a single unconditional contract to do that thing (*a*). In Roman law the presumption seems distinctly in favour of the promisor remaining bound to do what is possible (*b*); otherwise it agrees with ours (*c*).

**Effects of
default.**

The exception as to *mora* in the extract given in the note shows the application here of the general rule as to impossibility caused by acts of the parties. The case put is that the creditor has made his election (to have Stichus, suppose) but has neglected or refused to accept Stichus: now if Stichus dies he cannot demand Pamphilus. It is the same as if there had been a single promise, and the performance made impossible by the promisee's default. The same rule is given in another passage (*d*).

**Condi-
tional
contracts.**

There is yet something to be said of the treatment of conditional contracts where the condition is or becomes impossible. A condition may be defined for the present purpose as an agreement or term of an agreement whereby the existence of a con-

(*a*) *Brown v. Royal Insurance Co.* p. 857 above.

(*b*) Save that in the case of an alternative obligation to deliver specific objects at the promisor's election he still has an election in *solutione*, as it is said, i.e. he may at his option pay the value of that which has perished. See Vangerow, Pand. § 569, note 2 (8. 22 sqq.) where the subject is fully worked out.

(*c*) Papinian says: *Stichum aut Pamphilum, utrum ego velim, dare spondes?* altero mortuo, qui vivit solus petetur, nisi si mora facta sit in eo mortuo, quem petitor elegit; tunc enim perinde solus ille qui decessit praebetur ac si solus in obligationem deductus fuisset. Quod si promissoris fuerit electio, defuncto altero (i.e. before election

made), qui superest aequè peti potest. D. 46. 8. de solut. et lib. 95 pr. He proceeds to this curious question: What if one dies by the debtor's default before election made, and afterwards the other dies without his default? No action can be maintained on the stipulation, but there is a remedy by *doli actio*.

(*d*) Stipulatus sum Damam aut Erotem servum dari, cum Damam dares, ego quominus acciperem in mora fui; mortuus est Dama; an putes me ex stipulatu actionem habere? Respondit, secundum Masurii Sabini opinionem puto te ex stipulatu agere non posse; nam is recte existimabat, si per debitorem mora non esset, quominus id quod debebat solveret, continuo eum debito liberari. D. 45. 1. de v. o. 105.

tract is made to depend on a future contingent event assigned by the will of the parties (α).

The condition may be either that an event shall or that it shall not happen, and is called positive or negative accordingly. Now the event which is the subject-matter of the condition, instead of being really contingent, may be necessary or impossible, in itself or in law. But the negation of a necessary event is impossible and the negation of an impossible event is necessary. It therefore depends further on the positive or negative character of the contingency whether the condition itself is necessary or impossible.

Thus we may have conditional promises with conditions of these kinds :

Necessary :

(α) By affirmation of a necessity. As a promise to pay 100*l.*, "if the sun shall rise to-morrow."

(β) By negation of an impossibility : "If J. S. does not climb to the moon," or "if my executor does not sue for my debt to him."

Impossible :

(γ) By affirmation of an impossibility : "If J. S. shall climb to the moon," or "if J. S. shall create a new manor."

(δ) By negation of a necessity : "If the sun shall not rise to-morrow," or "if my personal estate shall not be liable to pay my debts" (δ).

It is obvious that as a matter of logical construction the forms (α) and (β) are equivalent to unconditional promises, (γ) and (δ) to impossible or nugatory promises. And so we find it dealt with by the Roman law (c). It is equally obvious that (still as a matter of logical construction) there is nothing to prevent the condition from having its regular effect if the event is or becomes impossible in fact. For example, "if A. shall dig 1000 tons of clay on B's land in every year for the next seven years" : here there may not be so much clay to be dug, or A. may die in the

In what
ways
condition
may be
necessary
or im-
possible.

(α) Savigny, Syst. § 116 (3. 121) ; Pothier, Obl. § 199.

(δ) Slightly modified from Savigny, Syst. § 121 (3. 156, 158).

(c) "Si impossibilis conditio obligationibus adiciatur, nihil valet stipulatio. Impossibilis autem conditio habetur, cui natura impedi-

mento est quo minus existat, veluti si quis ita dixerit : Si digito caelum attigero, dare spondes ? At si ita stipuletur : Si digito caelum non attigero, dare spondes ? pure facta obligatio intelligitur ideoque statim petere potest." I. 3. 19. de inut. stipul. § 11.

first year. But a promise so conditioned is perfectly consistent and intelligible without importing any further qualification into it : and it would obviously be more difficult to come to the conclusion that some further qualification is to be understood than in the case of a direct and unconditioned contract by A. himself to dig so much clay.

Direct covenants or promises dependent on express conditions must be construed with reference to these general principles : beyond this no rule can be given except that it is never to be forgotten that the object of judicial construction is to ascertain and give effect to the real meaning of the parties (a).

Treatment
of condi-
tions in
English
law.

Practically the discussion in our books of conditions and their effect on the legal transactions into which they enter is limited to the following sorts of questions :

1. What contracts are really conditional, or in technical language, what amounts to a condition precedent (b) :

2. The effect of conditions and conditional limitations in conveyances at common law and under the Statute of Uses (which topics are obviously beyond our present scope) :

3. The effect of conditions in bonds. This form of contract, as we need hardly say, is now gone out of use except for certain special purposes, but was formerly general, insomuch that almost all the older learning on the construction and performance of contracts is to be found under the head of conditions. Here there are some peculiarities which call for our attention in this place.

Bonds.
Difference
between
the tech-
nical form
and the
real
meaning
of the in-
strument.

So far as the form goes, a bond is a contract dependent on a negative condition. In the first instance the obligor professes to be bound to the obligee in a sum of a certain amount. Then follows the condition, showing that if a certain event happens (generally something to be done by the obligor) the bond shall be void, but otherwise it shall remain in force. "The condition is subsequent to the legal obligation ; if the condition be not fulfilled the obligation remains" (c). This is in terms a promise,

(a) See per Martin, B. in *Bradford v. Williams*, L. R. 7 Ex. at p. 259.

(b) The classical authority on this topic is Serjeant Williams' note to *Pordage v. Cole*, 1 Wms. Saund.

550 : see also notes to *Cutter v. Powell*, 2 Sm. L. C. 11.

(c) Sir W. W. Follett, *arg.* *Beswick v. Swindells*, 3 A. & E. 875.

stated in a singularly involved way, to pay a sum of money if the event mentioned in the condition does not happen. But this, as everybody knows, is not the true nature of the contract. The object is to secure the performance of the condition, and the real meaning of the parties is that the obligor contracts to perform it under the conventional sanction of a penal sum. This view is fully recognized by the modern statutes regulating actions on bonds, by which the penalty is treated as a mere security for the performance of the contract or the payment of damages in default (a). On principle, therefore, a bond with an impossible condition, or a condition which becomes impossible, should be dealt with just as if it were a direct covenant to perform that which is or becomes impossible. In the former case the bond should be void, in the latter the rule in *Taylor v. Caldwell* (b) would determine whether it were avoided or not. We have seen that where the condition is *illegal* our courts have found no difficulty in considering the bond as what in truth it is, an agreement to do the illegal act. But in the case of impos-

Where condition immediately impossible, obligation is absolute, according to the purely formal construction.

sibility the law has stuck at the merely formal view of a bond as a contract to pay the penal sum, subject to be avoided by the performance of the condition: accordingly if the condition is impossible either in itself or in law the obligation remains absolute. "If a man be bound in an obligation, &c., with condition that if the obligor do go from the church of St. Peter in Westminster to the church of St. Peter in Rome within three hours, that then the obligation shall be void. The condition is void and impossible and the obligation standeth good." So, again, if the condition is against a maxim or rule in law, as "if a man be bound with a condition to enfeoff his wife, the condition is void and against law, because it is against the maxim in law, and yet the bond is good" (c).

In the same way, "when the condition of an obligation is so insensible and incertain that the meaning cannot be known, there the condition only is void and the obligation good" (d).

On the point of subsequent impossibility, however, the strictly formal view is abandoned, and an opposite result arrived at, but

But subsequent impossibility.

(a) As to these see *Preston v. Dania*, L. R. 8 Ex. 19.

(b) 3 B. & S. 826, *supra*, p. 362.

(c) Co. Lit. 206 b (some of the

&c.'s in Coke's text are omitted). To the same effect *Shepp. Touchst* 372.

(d) *Shepp. Touchst.* 373.

sibility
is a
discharge.

still in an artificial way. The condition, it is said, is for the benefit of the obligor, and the performance thereof shall save the bond; therefore he shall not lose the benefit of it by the act of God (a), and where the condition is possible at the date of the instrument "and before the same can be performed the condition becomes impossible by the act of God, or of the law, or of the obligee, there the obligation is saved" (b), or as another book has it "the obligation and the condition both are become void" (c). "Generally if a condition that was possible when made is become impossible by the act of God, the obligation is discharged" (d). As to the acts of the law and of the obligee this agrees with the doctrine of contracts in general: as to inevitable accident it establishes a different rule. The decision in *Laughter's* case (*supra*, p. 373) was an application of the same view, and it therefore appears that there should never have been any question of extending it to direct covenants or contracts.

The peculiar law thus laid down is distinctly recognized by modern authorities (e). However, if a bond appears on the face of it to be given to secure the performance of an agreement which it recites, the condition will take effect according to the true intention of the agreement rather than the technical construction resulting from the form of the instrument (f).

Alter-
native
conditions,
and default
of parties;
same law
as for
ordinary
contracts.

Alternative conditions, at any rate as to immediate impossibility, and conditions made impossible by the default of the parties, or otherwise than by the "act of God," are treated in the same way as direct promises.

"When a condition becomes impossible by the act of the obligor, such impossibility forms no answer to an action on the bond" (g).

"When the condition of an obligation is to do two things by a day, and at the time of making the obligation both of them are possible, but after, and before the time when the same are to be done, one of the things is become impossible by the act of God, or

(a) This reasoning appears both in *Laughter's* ca. 5 Co. Rep. 21 b, and *Lamb's* ca. *ib.* 23 b.

(b) Co. Lit. 206 a.

(c) Shepp. Touchst. 372.

(d) Ro. Ab. 1. 449, G, pl. 1; repeated on p. 451, I, pl. 1.

(e) 1. Wms. Saund. 238; per

Williams, *J. Brown v. Mayor of London*, 9 C. B. N. S. 726, 747, 30 L. J. C. P. 225, 230.

(f) *Berwick v. Swindells*, Ex. Ch., 3 A. & E. 868.

(g) Per Cur. *Berwick v. Swindells*, 3 A. & E. at p. 883.

by the sole act and laches of the obligee himself; in this case the obligor is not bound to do the other thing that is possible, but is discharged of the whole obligation. But if at the time of making of the obligation one of the things is and the other of the things is not possible to be done, he must perform that which is possible. And if in the first case one of the things become impossible afterwards by the act of the obligor or a stranger, the obligor must see that he do the other thing at his peril." "If the condition be that A. shall marry B. by a day, and before the day the obligor himself doth marry her: in this case the condition is broken. But if the obligee marry her before the day, the obligation is discharged" (a).

"If a man is bound to me in 20*l.* on condition that he pay me 10*l.*, in that case if he tender me the money and I refuse he is altogether excused from the obligation, because the default is on my part who am the obligee" (b).

We subjoin the provisions of the Indian Contract Act on the subject of this chapter. It will be seen that simplicity is gained at the expense of considerable departure from the principles of English law, and perhaps also at the expense of definiteness on some points. The most important change is the extension of the principle of *Taylor v. Caldwell* so as to make it an implied condition in all contracts that the performance shall remain possible.

Indian
Contract
Act:
departs
from Eng.
law.

53. When a contract contains reciprocal promises and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration.

A. and B. contract that B. shall execute certain work for A. for a thousand rupees. B. is ready and willing to execute the work accordingly, but A. prevents him from doing so. The contract is voidable at the option of B.; and if he elects to rescind it, he is entitled to recover from A. compensation for any loss which he has incurred by its non-performance.

56. An agreement to do an act impossible in itself is void.

A contract to do an act which after the contract is made becomes impossible, or by reason of some event which the promisor could not

(a) Shepp. Touchst. 382, 392. (b) Brian, C. J. 22 Ed. 4. 26.
And see pp. 393-4.

prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise (a).

Illustrations.

a. A. agrees with B. to discover treasure by magic. The agreement is void.

b. A. and B. agree to marry each other. Before the time fixed for the marriage A. goes mad. The contract becomes void.

c. A. contracts to marry B., being already married to C. and being forbidden by the law to which he is subject to practise polygamy. A. must make compensation to B. for loss caused to her by the non-performance of his promise.

d. A. contracts to take in cargo for B. at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared. [This illustration=*Esposito v. Bowden*, 7 E. & B. 763, 27 L. J. Q. B. 17, *supra*, p. 282.]

e. A. contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A. is too ill to act. The contract on these occasions becomes void. [*Robinson v. Davison*, *supra*, p. 368. *Qu.* whether under s. 65 A. would not be bound to return a proportionate part of the payment: though English law is otherwise.]

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration.

A. contracts with B. to repair B's house. B. neglects or refuses to point out to A. the place in which his house requires repair.

B. is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

Compare also Chapter III. of the Act, "On Contingent Contracts," ss. 31-36.

(a) As this is hardly applicable to a promise impossible in the nature of things, it seems that the general enactment in the first paragraph of

the section must include cases of what we have called impossibility in fact.

CHAPTER VIII.

MISTAKE.

PART 1. OF MISTAKE IN GENERAL.

HITHERTO we have been dealing with perfectly general conditions for the formation or subsistence of a valid contract, and as a consequence of this the rules of law we have had occasion to explain are for the most part collateral or even paramount to the actual intention or belief of the parties. Exceptions to this do certainly occur, but chiefly where (as in great part of the doctrine of Impossibility) the rules are in truth reducible to rules of construction. We have had before us, on the whole, the purely objective conditions of contract; the questions which must be answered before the law can so much as think of giving effect to the consent of the parties. We now come to a set of conditions which by comparison with the foregoing ones may fairly be called subjective. The consent of the parties is now the central point of the inquiry, and our task is to examine how the legal validity of an agreement is affected when the consent or apparent consent is determined by certain causes. Conditions affecting reality or freedom of consent.

The existence of consent is ascertained in the first instance by the rules and considerations set forth in our opening chapter. When the requirements there stated are satisfied by a proposal duly accepted, there is *prima facie* a good agreement, and the mutual communications of the parties are taken as the expression of a valid consent. But we still require other conditions in order to make the consent binding on him who gives it, although their absence is in general not to be assumed, and the party seeking to enforce a contract is not expected to give affirmative

proof that they have been satisfied. Not only must there be consent but the consent must be true, full, and free.

The reality and completeness of consent may be affected (*a*) by ignorance, that is, by wrong belief or mere absence of information or belief as to some fact material to the agreement. Freedom of consent may be affected by fear or by the consenting party being, though not in bodily or immediate fear, yet so much under the other's power, or in dependence on him, as not to be in a position to exercise his own deliberate choice. Now the results are entirely different according as these states of mind are or are not due to the conduct of the other party (or, in certain cases, to a relation between the parties independent of the particular occasion). When they are so, the legal aspect of the case is altogether changed, and we look to that other party's conduct or position rather than to the state of mind induced by it. We speak not of Mistake induced by Fraud, but of Fraud simply, as a ground for avoiding contracts, though there can be no Fraud where there is no Mistake. We have then the following combinations :

Classifica-
tion and
legal con-
sequences
of Mistake,
Fraud, &c.

A. Ignorance.

A. Not caused by act (*b*) of other party,
is referred in law to the head of

Mistake.

Caused by act (*b*) of other party

B. without wrongful intention.

Misrepresentation.

C. with wrongful intention.

Fraud.

B. Fear, or dependence

excluding freedom of action.

Not caused by acts of other
party or relation between
the parties.

(Immaterial.)

D. Caused by such acts.

Duress or Coercion.

E. By such relation.

Undue influence.

The legal consequences of these states of things are exceedingly various.

(*a*) It is quite wrong, as Savigny has shown, to say that a consent determined by mistake, fraud, or coercion is no consent. Syst. §§ 114, 115 (3. 98 sqq.) If it were so the agreement would be absolutely void in all cases : a *reductio ad absurdum* which is no less complete for English than for Roman law. See per Lord

Cranworth, *Boyse v. Rossborough*, 6 H. L. C. at p. 44, and per Lord Chelmsford, *Oakes v. Turquand*, L. R. 2 H. L. at p. 349.

(*b*) It will be seen hereafter that omissions are equivalent to acts for this purpose in certain exceptional cases.

A. Mistake does not *of itself* affect the validity of contracts at all (a). But mistake may be such as to prevent any real agreement from being formed ; in which case the agreement is void both at law and in equity : or mistake may occur in the expression of a real agreement ; in which case, subject to rules of evidence, the mistake can be rectified. The jurisdiction to do this is peculiar to equity. There are also certain rules in the construction of contracts which are peculiar to equity, and are founded on the assumption that the expressions used do not correspond to the real intention (b).

B. Contracts induced by misrepresentation are not void. To a certain extent at law, and to a considerable extent in equity, they are voidable at the option of the party misled.

C. Contracts induced by fraud are not void, but voidable both at law and in equity at the option of the party deceived.

D, E. Contracts entered into under coercion or undue influence are not void. If induced by direct personal coercion, they are voidable at law as well as in equity ; if by other forms of compulsion or undue influence, in equity only, by the party on whom coercion or undue influence is exercised.

These subjects have now to be considered in order. And first of Mistake.

The whole topic is surrounded with a great deal of confusion in our books, though on the whole of a verbal kind, and more embarrassing to students than to practitioners. Exactly the same kind of confusion prevailed in the civil law (whence indeed some of it has passed on to our own) until Savigny cleared it up in the masterly essay which forms the Appendix to the third volume of his System. The principles there established by him have been fully adopted by later writers (c). They appear to be in the main applicable to the law of England, and we shall

Mistake:
difficulties
and
confusions
attending
the
subject.

(a) Just as fear, merely as a state of mind in the party, is in itself immaterial. As Fear is to Coercion, so is Mistake to Fraud. Sav. Syst. 3. 116.

(b) Causes and matters for (*inter alia*) the rectification or setting aside or cancellation of deeds or other written instruments are assigned to the Chancery Division by s. 34 of the Supreme Court of Judi-

cature Act, 1873.

(c) Some of his conjectural dealings with specific anomalies in the Roman texts are at least daring, but this does not concern English students. Vangerow gives the general doctrine (Pand. § 83, 1. 116 sqq.) and its special application to contract (*ib.* § 604, 3. 275) in a compact and useful form.

accordingly be guided by them. In arrangement and detail, however, we shall consult the convenience of English practice and of our present special purpose.

The difficulties which have arisen as well with us as in the civil law may be accounted for under the following heads :

(1.) Confusion of proximate with remote causes of legal consequences : in other words, of cases where mistake has legal results of its own with cases where it determines the presence of some other condition from which legal results follow, or the absence of some other condition from which legal results would follow, or even where it is absolutely irrelevant.

(2.) The assertion of propositions as general rules which ought to be taken with reference only to particular effects of mistake in particular classes of cases. Such are the maxim *Non videntur qui errant consentire* and other similar expressions, and to some extent the distinction between ignorance of fact and of law (*a*).

(3.) Omission to assign an exact meaning to the term "ignorance of law" in those cases where the distinction between ignorance of law and ignorance of fact is material (the true rule, affirmed for the Roman law by Savigny, and in a slightly different form for English law by Lord Westbury (*b*), being that "ignorance of law" means only ignorance of a *general rule* of law, not ignorance of a right depending on questions of mixed law and fact, or on the true construction of a particular instrument).

It is needless to point out in detail how these influences have operated on our books and even on judicial expressions of the law. We rather proceed to deal with the matter affirmatively on that which appears to us its true footing.

A. General
rule:
Mistake
as such in-
operative:

A. *Mistake in general.*

The general rule of private law is that mistake *as such* has no legal effects at all. This may be more definitely expressed as follows :

Where an act is done under a mistake, the mistake does not either add anything to or take away anything from the legal consequences of such act either as regards any right of other

(*a*) See Savigny's Appendix, Nos. VII., VIII. Syst. 3. 342, 344.

(*b*) *Cooper v. Phibbs*, L. R. 2 H. L. at p. 170 : to which the dicta

in the later case of *Earl Beauchamp v. Winn*, L. R. 6 H. L. 223, really add little or nothing.

persons or any liability of the person doing it, nor does it produce any special consequences of its own ;

unless knowledge of something which the mistake prevents from being known, or an intention necessarily depending on such knowledge, be from the nature of the particular act a condition precedent to the arising of some right or duty under it.

except where by the special nature of the case knowledge is a condition precedent of legal consequences.

Special exceptions to the rule exist, but even these are founded on special reasons beside, though connected with, the mistake itself.

There are abundant examples to show the truth of this proposition in both its branches.

First, mistake is in general inoperative as to the legal position or liability of the party doing an act. We must premise that a large class of cases is altogether outside this question, as appears by the qualification with which the rule has just been stated ; those, namely, where a liability attaches not to the doing of an act in itself, but to the doing of it *knowingly*. There, if the act is done without knowledge, the offence or wrong is not committed, and no liability arises. It is not that ignorance is an excuse for the wrongful act, but that there is no wrongful act at all.

As to the position of the person acting under mistake.

The wider question how far and under what conditions ignorance of fact excludes criminal liability must also be put aside as beyond the scope of this work, and too important to be discussed incidentally (a).

It is certain that ignorance is as a rule no excuse as regards the liabilities of a quasi-criminal kind which arise under penal statutes (b) or such as are purely civil. Thus ignorance of the real ownership of property is no defence to an action of trover, except for carriers and a few other classes of persons exercising public employments of a like nature, who by the necessity of the case are specially privileged (c). Again, railway companies and other employers have in many cases been held liable for acts of their servants done as in the exercise of their regular employment, and without any unlawful intention, but in truth unlawful

Wrongful acts: ignorance in general no excuse.

(a) See Stephen's Digest of Criminal Law, Art. 84, *Reg. v. Prince*, L. R. 2 C. C. R. 154.

(b) That ignorance cannot be pleaded in discharge of statutory penalties, see *Carter v. McLaren*,

L. R. 2 Sc. & D. 125-6.

(c) *Fowler v. Hollins*, Ex. Ch., L. R. 7 Q. B. 616, *affd.* in H. L. *nom. Hollins v. Fowler*, L. R. 7 H. L. 757.

by reason of a mistake on the part of the servant : the act being one which, if the state of circumstances supposed by him did exist, would be within the scope of his lawful authority (*a*). Of course the servant himself is equally liable. Here, indeed, it looks at first sight as if the mistake gave rise to the employer's liability. For the act, if done with knowledge of the facts, and so merely wrongful in intention as well as in effect, would no more charge the employer than if done by a stranger. But it is not that mistake has any special effect, but that knowledge, where it exists, takes the thing done out of the class of authorized acts. The servant who commits a wilful and gratuitous (*b*) wrong (or goes out of his way to do something which if the facts were as he thought might be lawful or even laudable, but which he has no charge to do) is no longer about his master's business.

Excep-
tions in
judicial
process,
but
limited.

Real exceptions are the following. An officer of a court who has quasi-judicial duties to perform, such as those of a trustee in bankruptcy, is not personally answerable for money paid by him under an excusable misapprehension of the law (*c*). Also an officer who in a merely ministerial capacity executes a process apparently regular, and in some cases a person who pays money under compulsion of such process, not knowing the want of jurisdiction, is protected, as it is but reasonable that he should be (*d*). But this special exception is confined within narrow bounds. Mistake as to extraneous facts, such as the legal character of persons or the ownership of goods, is no excuse. It is a well established rule of law that if by process a sheriff is desired to seize the goods of A. and he takes those of B. he is liable in trover (*e*). A sheriff seized under a *fi. fu.* goods supposed to belong to the debtor by marital right. Afterwards the supposed wife discovered that when she went through the

(*a*) See the distinction explained and illustrated by *Poulton v. L. & S. W. R. Co.* L. R. 2 Q. B. 534, and several later cases : the last are *Bayley v. Manchester, &c., Ry. Co.* Ex. Ch. L. R. 8 C. P. 148 (employer liable); *Bolingbroke v. Swindon Local Board*, L. R. 9 C. P. 575 (employer not liable).

(*b*) A wilful trespass which is not gratuitous, but done in the course of employment and for the master's in-

tended benefit, though without or against orders, may make the master liable : as in *Limpus v. London General Omnibus Co.* (Ex. Ch.) 1 H. & C. 526, 32 L. J. Ex. 34.

(*c*) *Ex parte Ogle*, 8 Ch. 711.

(*d*) See *Mayor of London v. Cox*, L. R. 2 H. L. at p. 269.

(*e*) *Glasspoole v. Young*, 9 B. & C. 696, 700 ; cp. *Garland v. Carlisle*, 4 Cl. & F. 693.

ceremony of marriage the man had another wife living: consequently she was still the sole owner of the goods when they were seized. Thereupon she brought trover against the sheriff, and he was held liable, though possibly the plaintiff might have been estopped if she had asserted at the time that she was the wife of the person against whom the writ issued (a).

There are certain classes of cases, indeed, in which it may be said that mistake, or at any rate ignorance, is the condition of acquiring legal or equitable rights. These are the exceptional cases in which an apparent owner having a defective title, or even no title, can give to a purchaser a better right than he has himself, and which fall under the rules of law touching market overt and the transfer of negotiable instruments, and the rule of equity that the purchase for valuable consideration without notice of any legal estate, right, or advantage is "an absolute, unqualified, unanswerable defence" (b) against any claim to restrict the exercise or enjoyment of the legal right so acquired (c). These rules depend on special reasons. The two former introduce a positive exception to the ordinary principles of legal ownership, for the protection of purchasers and the convenience of trade (d). It is natural and necessary that such anomalous privileges should be conferred only on purchasers in good faith. Now good faith on the purchaser's part presupposes ignorance of the facts which negative the vendor's apparent title. It may be doubted on principle, indeed, whether this ignorance should not be free from negligence in order to entitle him. For some time this was so held in the case of negotiable instruments, but is so no longer (e). The rule of equity, though in some sort analogous to this, is not precisely so. A transfers legal ownership to B., a purchaser for value, by an act effectual

Ignorance in certain cases condition of acquiring rights: (purchase for value without notice).

(a) *Glasspoole v. Young*, 9 B. & C. 696, 700.

(b) *Pilcher v. Rawlins*, 7 Ch. 259, 269, per James, L. J.; *Blackwood v. London Chartered Bank of Australia*, L. R. 5 P. C. 92, 111.

(c) This applies not only to purely equitable claims but to all purely equitable remedies incident to legal rights. But it does not apply to those remedies for the enforcement of legal rights which in a few cases have been administered by courts of

equity concurrently with courts of law. Per Lord Westbury, *Phillips v. Phillips*, 4 D. F. J. 208.

(d) As to market overt the policy of the rule seems an open question. The Indian Contract Act contains no such provision (see s. 108) while on the other hand the German Commercial Code (s. 306) extends it to all sales made by a trader in the course of his business.

(e) See Chapter V., p. 212, above.

for that purpose. If in A's hands the legal ownership is fettered by an equitable obligation restraining him wholly or partially from the beneficial enjoyment of it, this alone will not impose any restriction upon B. For all equitable rights and duties are in their origin and proper nature not *in rem* but *in personam*. But if B. (by himself or his agent) knows of the equitable liability, or if the circumstances are such that with reasonable diligence he would know it, then he makes himself, actively by knowledge, or passively by negligent ignorance, a party to A's breach of duty. In such case he cannot rely on the legal right derived from A., and disclaim the equitable liability which he knew or ought to have known to attach to it: and the equitable claim is no less enforceable against him than it formerly was against A. To be accurate, therefore, we should say not that an exception against equitable claims is introduced in favour of innocent purchasers, but that the scope of equitable claims is extended against purchasers who are not innocent; not that ignorance is a condition of acquiring rights, but that knowledge (or means of knowledge treated as equivalent to actual knowledge) is a condition of being laden with duties which, as the language of equity has it, affect the conscience of the party (a).

Limits
of these
excep-
tional
rights.

Even here the force and generality of the main rule is shown by the limits set to the exceptions. The purchaser of any legal right for value and without notice is to that extent absolutely protected. But the purchaser of an equitable interest, or of a supposed legal right which turns out to be only equitable, must yield to all prior equitable rights (b), however blameless or even unavoidable his mistake may have been. Again no amount of negligence will vitiate the title of a *bona fide* holder of a negotiable instrument, but not the most innocent mistake will enable him to make title through a forged indorsement. Where a bill was drawn payable to the order of one H. Davis and indorsed by another H. Davis it was held that a person who innocently discounted it on the faith of this indorsement had no title (c).

(a) Observe that on the point of negligence the rule of equity differs from the rules of law: though, as the subject-matter of the rules is different, there is no actual conflict.

(b) *Phillips v. Phillips*, 4 D. F. J. 208: though a purchaser for value

without notice will not be deprived by a court of equity of anything he has actually got, e.g. possession of title-deeds: *Heath v. Crealock*, 10 Ch. 22, *Waldy v. Gray*, 20 Eq. 238.

(c) *Mead v. Young*, 4 T. R. 28.

It might also be said that where tacit assent or acquiescence is in question, there ignorance is in like manner a condition of not losing one's rights. But this is not properly so. For it is not that ignorance avoids the effect of acquiescence, but that there can be no acquiescence without knowledge. It is like the case where knowledge or intention must be present to constitute an offence. In this sense and for this purpose "*nulla voluntas errantis est*" (a).

The same principles hold in cases more directly connected with the subject of this work. A railway company carries an infant above the age of three years without taking any fare, the clerk assuming him to be under that age, and there being no fraud on the part of the person in whose care he travels: the mistake does not prevent the company from being liable on their contract to carry him safely (b). A person who does not correctly know the nature of his interest in a fund disposes of it to a purchaser for value who has no greater knowledge and deals with him in good faith; if he afterwards discovers that his interest was in truth greater and more valuable than he supposed it to be, he cannot claim to have the transaction set aside on the ground of this mistake (c). This, however, is to be taken with caution, for it applies only to cases where the real intention is to deal with the party's interest, whatever it may be. Were the intention of both parties to deal with it only on the implied condition that the state of things is not otherwise than it is supposed to be, the result would be quite different, as we shall find under the head of Fundamental Error.

Applica-
tion of the
general
rule in
cases of
contract.

So far, then, mistake as such does not improve the position of the party doing a mistaken act. Neither does it as a rule make it any worse. A mistaken demand which produces no result does not affect a plaintiff's right to make the proper demand afterwards. Where B. holds money as A's agent to pay it to C., and appropriates it to his own use, C. may recover from A. notwithstanding a previous mistaken demand on B's estate, made on the assumption that B. would be treated as C's own

(a) D. 39. 3. de aqua plu. 20.

(b) *Austin v. G. W. R. Co.* L. R. 2 Q. B. 442. The judgments treat it as one entire contract with the mother of the infant plaintiff, who

took only one ticket for herself; it seems therefore that strictly she ought to have been the plaintiff.

(c) *Marshall v. Collett*, 1 Y. & C. Ex. 232.

agent (a). Nor does a mistaken repudiation of ownership prevent the true owner of goods from recovering damages afterwards for injury done to them by the negligence of a bailee, whose duty it was to hold them for the true owner at all events (b). This is independent of and quite consistent with the rule that a party who has wholly mistaken his remedy cannot be allowed to proceed by way of amendment *in the same action* in an entirely different form and on questions of a different character (c).

As to
existing
rights of
other
persons.

Next, mistake does not in general alter existing rights. The presence of mistake will not make an act effectual which is otherwise ineffectual. Many cases which at first sight look like cases of relief against mistake belong in truth to this class, the act being such that for reasons independent of the mistake it is inoperative. Thus a trustee's possession of land is the possession of his cestui que trust, and it makes no difference if he is mistaken as to the person who really is cestui que trust. His payment over of the rents and profits to a wrong person, whether made wilfully and fraudulently, or ignorantly and in good faith, cannot alter the character of the possession (d). Where the carrier of goods after receiving notice from an unpaid vendor to stop them nevertheless delivers them by mistake to the buyer, this does not defeat the vendor's rights: for the right of possession (e) reverts in the vendor from the date of the notice, if given at such a time and under such circumstances that the delivery can and ought to be prevented (f), and the subsequent mistaken delivery has not, as an intentional wrongful delivery would not have, any power to alter it (g). Again, by the rules of the French Post Office the sender of a letter can reclaim it after it is posted and before the despatch of the mail. C., a banker at Lyons, posted a letter containing bills of exchange indorsed to D., an English correspondent. Before the despatch

(a) *Hardy v. Metropolitan Land & Finance Co.* 7 Ch. 427, 1433. Cp. *Vangerow*, Pand. 1. 118.

(b) *Mitchell v. Lancashire & Yorkshire Ry. Co.* L. R. 10 Q. B. 256, 261.

(c) *Jacobs v. Seward*, L. R. 5 H. L. 464.

(d) *Lister v. Pickford*, 34 Beav. 576.

(e) The book has *property*: but

the use of this word assumes that stoppage *in transitu* rescinds the contract, contrary to the opinion which now prevails (*Schotsmans v. Lancashire & Yorkshire Ry. Co.* 2 Ch. 332, 340.)

(f) *Whitehead v. Anderson*, 9 M. & W. 518: *Blackburn on Cont. of Sale*, 269.

(g) *Litt v. Conley*, 7 Taunt. 169.

of the mail, learning from D's agent on the spot that the bills would not be accepted, C. sent to the post-office to stop the letter. It was put aside from the rest of the mail, but by a mistake of C's clerk in not completing the proper forms it was despatched in the ordinary course. It was held that there was no effectual delivery of the bills to D. and that the property remained in C. The mistake of the clerk could not take "the effect of making the property in the bills pass contrary to the intention of both indorser and indorsee" (a). Had not the revocation been at the indorsee's request, then indeed the argument would probably have been correct that it was a mere uncompleted intention on C's part: for as between C. and the post-office everything had not been done to put an end to the authority of the post-office to forward the letter in the regular course of post.

Anderson's case (b) may possibly be supported on a similar ground. It was there held that a transfer of shares sanctioned by the directors and registered in ignorance that calls were due from the transferor might afterwards be cancelled, even by an officer of the company without authority from the directors, on the facts being discovered. It may be that the directors' assent to the transfer is not irrevocable (apart from the question of mistake) until the parties have acted upon it.

Again, the legal effect of a transaction cannot be altered by Sub-sequent conduct of parties founded on mistaken construction does not alter the contract: the subsequent conduct of the parties: and it makes no difference if that conduct is founded on a misapprehension of the original legal effect. A man who acts on a wrong construction of his own duties under a contract he has entered into does not thereby entitle himself, though the acts so done be for the benefit of the other party, to have the contract performed by the other according to the same construction (c). This decision was put to some extent upon the ground that relief cannot be given against mistakes of law. But it is submitted that this is not a case where the distinction is really material. Suppose the party had not construed the contract wrongly, but acted on an erroneous

(a) *Ex parte Cote*, 9 Ch. 27, 32.

(b) 8 Eq. 509. *Sed qu.* Mr. Justice Lindley, who was himself counsel in the case, cites it (2. 1438) with the material qualification, "if the trans-

feree does not object."

(c) *Midland G. W. Ry. of Ireland v. Johnson*, 6 H. L. C. 798, 811, per Lord Chelmsford.

recollection of its actual contents, the mistake would then have been one of fact, but it is obvious that the decision must have been the same. Still less can a party to a contract resist the performance of it merely on the ground that he misunderstood its legal effect at the time (*a*). Every party to an instrument has a right to assume that the others intend it to operate according to the proper sense of its actual expressions (*b*).

unless
such that
apart from
mistake it
would
amount to
variation
by mutual
consent.

It must be remembered, however, that where both parties have acted on a particular construction of an ambiguous document, that construction, if in itself admissible, will be adopted by the Court (*c*). To this extent its original effect, though it cannot be *altered*, may be *explained* by the conduct of the parties. And moreover, if both parties to a contract act on a common mistake as to the construction of it, this may amount to a variation of the contract by mutual consent (*d*). This is in truth another illustration of the leading principle. Here their conduct in performing the contract with variations would show an intention to vary it if the true construction were present to their minds. And it might be said that (on the same principle as in cases of acquiescence, &c.) they cannot mean to vary their contract if they do not know what it really is. But the answer is that their true meaning is to perform the contract at all events according to their present understanding of it, and thus the mistake is immaterial and ineffectual. Practically such a mistake is likely to represent a real original intention incorrectly expressed in the contract: so that principle and convenience agree in the result.

Mistakes
in award.

We may also mention that there is no jurisdiction to set aside an award, or refer it back to the arbitrator, on the ground of a mistake in fact or law, unless the arbitrator admits the mistake

(*a*) *Powell v. Smith*, 14 Eq. 85. The dictum in *Wycombe Ry. Co. v. Donnington Hospital*, 1 Ch. 273, cannot be supported in any sense contrary to this.

(*b*) Per Knight Bruce, L. J. *Bentley v. Mackay*, 4 D. F. J. 285.

(*c*) *Forbes v. Watt*, L. R. 2 Sc. & D. 214. Evidence of the construction

put on an instrument by *some* of the parties is of course inadmissible: *McClellan v. Kennard*, 9 Ch. 336, 349.

(*d*) 6 H. L. C. p. 812-8. In the particular case the appellants were an incorporated company, and therefore it was said could not be thus bound: *sed qu.*

and desires the assistance of the Court to rectify it, or unless there is an actual excess of jurisdiction (a).

What then are the special classes of cases in which mistake is of importance, and which have given rise to the language held by our books on the subject?—(language which at times goes the length of such untenable statements as that mistake is enough to vitiate *any transaction*.) They are believed to be as follows.

1. Where mistake is such as to exclude real consent, and so—
not avoid the contract but—prevent the formation of a contract, there the seeming agreement is void. Of this we shall presently speak at large (Part 2 of this chapter).

Special cases where mistake is of importance.

1. As excluding true consent.

2. Where a mistake occurs in expressing the terms of a real consent, such mistake may be remedied by the special jurisdiction of courts of equity. Of this also we shall speak separately (Part 3).

2. In expressing a true consent.

3. A renunciation of rights in general terms is understood not to include rights of whose actual or possible existence the party was not aware. This is in truth a particular case under No. 2.

3. Renunciation of rights.

All these exceptions may be considered as more apparent than real.

4. Money paid under a mistake of fact may be recovered back. This is a real exception, and the most important of all. Yet even here the legal foundation of the right is not so much the mistake in itself as the failure of the supposed consideration on which the money was paid.

4. Payment of money.

B. *Mistake of Fact and of Law.*

B. Mistake of Fact and of Law.

It is an obvious principle that citizens must be presumed for all public purposes to know the law, or rather that they cannot be allowed to allege ignorance of it as an excuse. As has often been said, the administration of justice would otherwise be impossible. Practically the large judicial discretion which can be exercised in criminal law may be trusted to prevent the rule from operating too harshly in particular cases. On the other

(a) *Dinn v. Blake*, L. R. 10 C. P. 388. An arbitrator cannot of his own motion correct even a mani-

fest clerical error in his award after signing it: he should apply to the Court: *Mordue v. Palmer*, 6 Ch. 22.

hand it would lead to hardship and injustice not remediable by any judicial discretion if parties were always to be bound in matters of private law by acts done in ignorance of their civil rights. There is an apparent conflict between these two principles which has given rise to much doubt and discussion (a). But the conflict, if indeed it be not merely apparent, is at any rate much more limited in extent than is commonly supposed.

How far
the distinction is
applicable.

The rule, as generally stated, is to this effect :

Relief is given against mistake of fact but not against mistake of law.

Neither branch of the statement is true without a great deal of limitation and explanation. We have already seen that in most transactions mistake is altogether without effect. There, of course, the distinction has no place. Again there are the many cases where, as we have pointed out above, knowledge or notice is a condition precedent to some legal consequence. By the nature of these cases it generally if not always happens that the subject-matter of such knowledge, or of the ignorance which by excluding it excludes its legal consequences, is a matter of fact and not of law. The general presumption of knowledge of the law does so far apply, no doubt, that a person having notice of material facts cannot be heard to say that he did not know the legal effect of those facts. All these, however, are not cases of relief against mistake in any correct sense.

Where
common
mistake
excludes
real agreement,

Then come the apparent exceptions to the general rule, which we have numbered 1, 2, and 3. As to No. (1) it is at least conceivable that a common mistake as to a question of law should go so completely to the root of the matter as to

(a) Savigny, followed by Vangerow and other later writers, strikes out a general rule thus : Where mistake is a special ground of relief (and there only), the right to such relief is excluded by negligence. Ignorance of law is presumed to be the result of negligence, but the presumption may be rebutted by special circumstances, *e.g.* the law being really doubtful at the time. There is much to be said for this doctrine on principle, but it will not fit English law as now settled on

the most important topic, *viz.* recovering back money paid ; for there, so long as the ignorance is of fact, negligence is no bar : means of knowledge are material only as evidence of actual knowledge : *Kelly v. Solari*, 9 M. & W. 54, 11 L. J. Ex. 10 ; *Townsend v. Crowdy*, 8 C. B. N. S. 477, 29 L. J. C. P. 300. The only limitation is that the party seeking to recover must not have waived all inquiry ; per Parke, B. 9 M. & W. 59, and per Williams, J. 8 C. B. N. S. 494.

prevent any real agreement from being formed. It is impossible to see why a contract should be imposed on the parties by a legal fiction for the sake of asserting a general proposition in a state of circumstances where it is inapplicable. It is laid down by very high authority "that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into with a full knowledge of the facts" (a): but this does not touch the prior question whether there is a contract at all. On cases of this class English decisions go to this extent at all events, that ignorance of particular private rights is equivalent to ignorance of fact (b). As to No. (2) the principle appears to be the same. A. and B. make an agreement and instruct C. to put it into legal form. C. does this so as not to express the real intention, either by misapprehension of the instructions or by ignorance of law. It is obvious that relief should be equally given in either case. Indeed, if the parties were to be held to a contract they did not really make, merely because the erroneous expression was due to a mistake of law, this would be attributing a special legal effect to mistake, contrary not only to convenience but to the principal rule that mistake is in itself ineffectual.

ignorance
of private
right at all
events =
ignorance
of fact.

Rectifica-
tion of in-
struments:
relief given
against
mistake of
draftsman
though not
against a
deliberate
choice of
the parties
as to form
or contents
of instru-
ments.

Authority, so far as it goes, is in favour of what is here advanced (c). There is clear authority that on the other hand a court of equity will not reform an instrument by inserting in it a clause which the parties deliberately agreed to leave out (d), nor substitute for the form of security the parties have chosen another form which they deliberately considered and rejected (c), although their choice may have been determined by a mistake of law. The reason of these decisions, however, is that in such cases the form of the instrument, by whatever considerations arrived at, is part of the agreement itself and so beyond the power of the Court.

As to No. (3), there is quite sufficient authority to show Renuncia-
tion of
rights:

(a) *Bank of U. S. v. Daniel* (Sup. Ct. U.S.) 12 Peters 82, 56. Common mistake as to a collateral matter of law does not of course avoid a contract: *Eaglesfield v. Marquis of Londonderry*, 4 Ch. D. 693.

(b) *Bingham v. Bingham*, 1 Ves. Sr. 126, *Broughton v. Hutt*, 3 De

G. & J. 501, *Cooper v. Phibbs*, L. R. 1 H. L. 149, 170; of which cases a fuller account is given below.

(c) *Hunt v. Rousmaniere's Adm.* (Sup. Ct. U. S.) 1 Peters, 1, 13, 14.

(d) *Lord Irnham v. Child*, 1 Bro. C. C. 92.

distinction
as to com-
promise or
deliberate
abandon-
ment.

that a renunciation of rights under a mistake as to particular applications of law is not conclusive, and some authority to show that it is the same even if the mistake is of a general rule of law. The deliberate renunciation or compromise of doubtful rights is of course binding ; it would be absurd to set up ignorance of the law as an objection to the validity of a transaction entered into for the very reason that the law is not accurately known (a). A compromise deliberately entered into under advice, the party's agents and advisers having the question fully before them, cannot be set aside on the ground that a particular point of law was mistaken or overlooked (b). Conduct equivalent to renunciation of a disputed right is equally binding, at least when the party has the question fairly before him. Thus in *Stone v. Godfrey* (c) the plaintiff had been advised on his title unfavourably indeed, but in such a way as to bring before him the nature of the question and give him a fair opportunity of considering whether he should raise it. Adopting, however, the opinion he had obtained, he acted upon it for a considerable time, and in a manner which amounted to representing to all persons interested that he had determined not to raise the question. It was held that although the mistake as to title might in the absence of such conduct well be a ground of relief, a subsequent discovery that the correctness of the former opinion was doubtful did not entitle him to set up his claim anew. In the late case of *Rogers v. Ingham* (d) a fund had been divided between two legatees under advice, and the payment agreed to at the time. One of the legatees afterwards sued the executor and the other legatee for repayment, contending that the opinion they had acted upon was erroneous ; it was held that the suit could not be maintained. Similarly where creditors accepted without question payments under a composition deed to which they had not assented, and which, as it was afterwards decided, was for a technical reason not binding on non-assenting creditors, it was held that they could not afterwards treat the payments as made on account of the whole debt and sue for the balance. They might have guarded

(a) Cp. the remarks on compromises in Ch. IV., p. 166 above.

(b) *Stewart v. Stewart*, 6 Cl. & F. 911 ; see the authorities reviewed,

pp. 966—970.

(c) 5 D. M. G. 76.

(d) 3 Ch. D. 351 (V. C. H. and C. A.)

themselves by accepting the payments conditionally, but not having done so they were bound (a). In *Re Saxon Life Assurance Society* (b) it was held that a creditor of a company was not bound by a release given in consideration of having the substituted security of another company, which security was a mere nullity, being given in pursuance of an invalid scheme of amalgamation. Here the mistake was obviously not of a *general rule* of law; and perhaps the case is best put on the ground of total failure of consideration. In *M'Carthy v. Decaix* (c), however, a foreigner had married in England and obtained a divorce in Denmark. After the wife's death in England he used language in his correspondence with her relations which amounted to a general renunciation of marital rights. He supposed however that the Danish divorce was valid in England and that he had no legal interest in the wife's property. This error was on a perfectly general rule of law (though at the time but recently settled): but it was held that he was not precluded from asserting his rights as his wife's administrator.

As to No. (4), the subject of recovering back money paid by mistake does not properly fall within our scope. It is here, however, that the distinction between mistakes of fact and of law does undoubtedly and inflexibly prevail. While no amount of mere negligence avoids the right to recover back money paid under a mistake of fact (d), money paid under a mistake of law cannot in any case be recovered: nor does anything like the qualification laid down by Lord Westbury in *Cooper v. Phibbs* (e) appear to be admitted. Ignorance of particular rights, however excusable, is on the same footing as ignorance of the general law (f).

(a) *Kitchin v. Hawkins*, L. R. 2 C. P. 22.

(b) 2 J. & H. 408, 412 (the *Anchor* ca.)

(c) 2 Russ. & My. 614. But, in addition to the ground stated in the text, the wife's family represented to the husband, contrary to the fact, that her estate was insolvent.

(d) Note (a), p. 394, *supra*.

(e) L. R. 2 H. L. at p. 170.

(f) See *Skyring v. Greenwood*, 4 B. & C. 281, and cp. *Platt v. Bromage*, 24 L. J. Ex. 63, where

however the mistake was not only a mistake of law, but collateral to the payment, the money being really due; *Aiken v. Short*, 1 H. & N. 210, 25 L. J. Ex. 321, rests on the same ground, if the transaction in that case be regarded as the bare payment of another person's debt; if it be regarded as the purchase of a security, it is an application of the rule *caveat emptor*, as to which cp. *Clare v. Lamb*, L. R. 10 C. P. 334.

Money paid by mistake recoverable only when the mistake is of fact.

An important decision of the American Supreme Court appears to proceed on the assumption that giving a negotiable instrument is for this purpose equivalent to the payment of money, so that a party who gives it under a mistake of law has no legal or equitable defence (*a*). But this seems not consistent with the later English doctrine that inasmuch as "want of consideration is altogether independent of knowledge either of the facts or of the law," the defence of failure of consideration is available as between the parties to a negotiable instrument, whether the instrument has been obtained by a misrepresentation of fact or of law (*b*).

A covenant to pay a debt for which the covenantor wrongly supposes himself to be liable is valid in law, nor will equity give any relief against it if the party's ignorance of the facts negating his liability is due to his own negligence (*c*).

Apparent
exception
in Bank-
ruptcy :
trustee is
officer of
Court.

Otherwise
same rules
in equity
as at law.

The Court of Bankruptcy will order repayment of money paid to a trustee in bankruptcy under a mistake of law : but this is no real exception, for it is not like an ordinary payment between party and party. The trustee is an officer of the Court and "is to hold money in his hands upon trust for its equitable distribution among the creditors" (*d*). In general the rule that a voluntary payment made with full knowledge of the facts cannot be recovered back is no less an equitable than a legal one ; "the law on the subject was exactly the same in the old Court of Chancery as in the old Courts of Common Law. There were no more equities affecting the conscience of the person receiving the money in the one Court than in the other Court, for the action for money had and received proceeded upon equitable considerations" (*e*). Thus a party who has submitted to pay money under an award cannot afterwards impeach the award in equity on the ground of irregularities which were known to him when he so submitted (*f*). It has also been laid down that in a common administration suit a legatee cannot be made to refund over-

(*a*) *Bank of U. S. v. Daniel*, 12 Peters, 32.

(*b*) *Southall v. Rigg, Forman v. Wright*, 11 C. B. 481, 492, 20 L. J. C. P. 145 ; *Coward v. Hughes*, 1 K. & J. 443.

(*c*) *Wason v. Wareing*, 15 Beav.

151.

(*d*) *Ex parte James*, 9 Ch. 609, 614, per James, L. J.

(*e*) *Rogers v. Ingham*, (C. A.) 3 Ch. D. at p. 355, per James, L. J.

(*f*) *Goodman v. Sayers*, 2 Jac. & W. 249, 263.

payments voluntarily made by an executor (a) : but the context shows that this was said with reference to the frame of the suit and the relief prayed for rather than to any general principle of law : moreover it was not the executor, but the persons beneficially interested, who sought to make the legatee liable. But in *Bate v. Hooper* (b) the point arose distinctly : certain trustees were liable to make good to their testator's estate the loss of principal incurred by their omission to convert a fund of Long Annuities : they contended that the tenant for life ought to recoup them the excess of income which she had received : but as she had not been a willing party to any overpayment (c), it was decided that she could not be called upon to refund the sums which the trustees voluntarily paid her. In an earlier case an executor paid interest on a legacy for several years without deducting the property tax, and it was held that he could not claim to retain out of subsequent payments the sums which he should have deducted from preceding ones (d).

PART 2. MISTAKE AS EXCLUDING TRUE CONSENT.

In the first chapter we saw that no contract can be formed when there is a variance in terms between the proposal and the acceptance. In this case the question whether the parties really meant the same thing cannot arise, for they have not even said the same thing. A court of justice can ascertain a common intention of the parties only from some adequate expression of it, and the mutual communication of different intentions is no such expression. Cases to be dealt with in this subdivision.

We now have to deal with certain kinds of cases in which on the face of the transaction all the conditions of a concluded agreement are satisfied, and yet there is no real common intention and therefore no agreement.

First, it may happen that each party meant something, it may be a perfectly well understood and definite thing, but not the same thing which the other meant. Thus their minds never Where no real common intention,

(a) Per Lord Cottenham, *Lichfield v. Baker*, 13 Beav. 447, 453.

(b) 5 D. M. G. 338.

(c) She had in fact desired the

trustees to convert the fund : see p. 340.

(d) *Currie v. Gould*, 2 Madd. 163.

each party met, as is not uncommonly said, and the forms they have gone meaning a through are inoperative.
different thing.

Where there is a common intention but founded on a common error.

Next, it may happen that there does exist a common intention, which however is founded on an assumption made by both parties as to some matter of fact essential to the agreement. In this case the common intention must stand or fall with the assumption on which it is founded. If that assumption is wrong, the intention of the parties is from the outset incapable of taking effect. But for their common error it would never have been formed, and it is treated as non-existent. Here there is in some sense an agreement : but it is nullified in its inception by the nullity of the thing agreed upon. And it seems hardly too artificial to say that there is no real agreement. The result is the same as if the parties had made an agreement expressly conditional on the existence at the time of the supposed state of facts : which state of facts not existing, the agreement destroys itself.

In the former class of cases either one party or both may be in error : however that which prevents any contract from being formed is not the existence of error but the want of true consent. " Two or more persons are said to consent when they agree upon the same thing in the same sense " : this consent is essential to the creation of a contract (a), and if it is wanting it matters not whether its absence is due to the error of one party only or of both.

In the latter class of cases the error must be common to both parties. They do agree to the same thing, and it would be in the same sense, but that the sense they intend, though possible as far as can be seen from the terms of the agreement, is in fact nugatory. As it is, their consent is idle ; the sense in which they agree is, if one may so speak, insensible.

In both sets of cases we may say that the agreement is nullified by fundamental error ; a term it may be convenient to use in order to mark the broad distinction in principle from those cases where mistake appears as a ground of special relief.

Divisions of fundamental error.

We proceed to examine the different kinds of fundamental error relating :

(a) Indian Contract Act, 1872, s. 13 ; Hannen, J. in *Smith v. Hughes*, L. R. 6 Q. B. 609.

- A. To the nature of the transaction.
- B. To the person of the other party.
- C. To the subject-matter of the agreement.

A. *Error as to the nature of the transaction.*

On this the principal early authority is *Thoroughgood's case* (a). As to nature of the transaction. *Thoroughgood's case.* In that case the plaintiff, who was a layman and unlettered, had a deed tendered to him which he was told was a release for arrears of rent only. The deed was not read to him. To this he said "If it be no otherwise I am content;" and so delivered the deed. It was in fact a general release of all claims. Under these circumstances it was adjudged that the instrument so executed was not the plaintiff's deed. The effect of this case is "that, if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, it is nevertheless not his deed" (b): it was also resolved that "it is all one in law to read it in other words, and to declare the effect thereof in other manner than is contained in the writing"; but that a party executing a deed without requiring it to be read or to have its effect explained would be bound (i.e. to this extent, that he could not say it was not his deed, apart from any question of fraud or the like). Agreeably to this the law is stated in Sheppard's Touchstone, 56. But at present the mere reading over of a deed without an explanation of the contents would not be thought sufficient to show that the person executing it understood what he was doing (c).

The doctrine has recently been expounded and confirmed by the luminous judgment of the Court of Common Pleas in *Foster v. Mackinnon*.

(a) 2 Co. Rep. 9 b.

(b) Per Cur. L. R. 4 C. P. 711. It had been long before said, in 21 Hen. 7, that "if I desire a man to enfeoff me of an acre of land in Dale, and he tell me to make a deed for one acre with letter of attorney, and I make the deed for two acres, and read and declare the deed to him as for only one acre, and he seal the deed, this deed is utterly void whether the feoffor be lettered or not, because he gave credence to me and I deceived him." (Keilw. 70, b, pl. 6). And see the older

authorities referred to in note (c), next page. An anonymous case to the contrary, Skin. 159, is sufficiently disposed of by Lord St. Leonards' disapproval (V. & P. 173).

(c) *Hoghton v. Hoghton*, 15 Beav. 278, 311. In the case of a will the execution of it by a testator of sound mind after having had it read over to him is evidence, but not conclusive evidence, that he understood and approved its contents: *Pulton v. Andrew*, L. R. 7 H. L. 448, 460, sqq., 472.

v. *Mackinnon* (a). The action was on a bill of exchange against the defendant as indorser. There was evidence that the acceptor had asked the defendant to put his name on the bill, telling him it was a guaranty; the defendant signed on the faith of this representation and without seeing the face of the bill. The Court held that the signature was not binding, on the same principle that a blind or illiterate man is not bound by his signature to a document whose nature is wholly misrepresented to him.

A signature so obtained

“Is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended (b). . . . The position that if a grantor or covenantor be deceived or misled as to the *actual contents* of the deed, the deed does not bind him, is supported by many authorities: see Com. Dig. *Fait* (B. 2) (c), and is recognized by Bayley, B. and the Court of Exchequer in the case of *Edwards v. Brown* (d). Accordingly it has recently been decided in the Exchequer Chamber that if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor: *Swan v. North British Australasian Land Company* (e). These cases apply to deeds; but the principle is equally applicable to other written contracts.”

The judgment proceeds to notice the qualification of the general rule in the case of negotiable instruments signed in blank, *when the party signing knows what he is about*, i.e. that the paper is

(a) L. R. 4 C. P. 704, 711.

(b) The same rule is laid down, and for the same reason, in a rescript of Diocletian and Maximian: Si falsum instrumentum emtionis conscriptum tibi, velut locationis quam fieri mandaveras, subscribere te non relecto sed fidem habentem suasit, neutrum contractum, in utroque alterutrius consensu deficiente, constituisse procul dubio est. C. 4. 22. plus valere, 5.

(c) Cited also by Willes, J. 2 C. B. N. S. 624, and see 2 Ro. Ab. 28 S: the cases there referred to (30 E. 3. 31 b; 10 H. 6. 5, pl.

10) show that the principle was recognized in very early times.

(d) 1 C. & J. 312.

(e) 2 H. & C. 175, 32 L. J. Ex. 273. And it was there doubted whether a man can be estopped by mere negligence from showing that a deed is not really his deed. See per Byles, J. 2 H. & C. 184, 32 L. J. Ex. 278, and per Cockburn, C. J. 2 H. & C. 189, 32 L. J. Ex. 279. Mellish, L. J. in *Hunter v. Walters*, 7 Ch. 75, 87, mentioned this question as still open: and see *Halifax Union v. Wheelwright*, L. R. 10 Ex. 192.

afterwards to be filled up as a negotiable instrument (a). But here the defendant "never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature." He was no more bound than if he had signed his name on a blank sheet of paper, and the signature had been afterwards fraudulently misapplied (b). This decision shows clearly that an instrument executed by a man who meant to execute not any such instrument but something of a different kind is in itself a mere nullity, though the person so executing it may perhaps be estopped from disputing it if there be negligence on his part (c); and that, notwithstanding the importance constantly attached by the law to the security of *bona fide* holders of negotiable instruments, no exception is in this case made in their favour.

The existence of a fundamental error of this sort, not merely as to particulars, but as to the nature and substance of the transactions, comes very seldom, if ever, to be considered by a court of equity, except in connexion with questions of fraud from which it is not always practicable to disentangle the previous question, Was there any consenting mind at all? There is enough however to show that the same principles are applied.

Such questions in Equity generally complicated with circumstances of fraud.

Thus in *Kennedy v. Green* (d) the plaintiff was induced to execute an assignment of a mortgage, and to sign a receipt for money which was never paid to her, "*without seeing what she was setting her hand to*, by a statement that she was only completing her execution of the mortgage deed itself, or doing an act by which she would secure the regular payment of the interest upon her

Kennedy v. Green.

(a) Whether this is a branch of the general principle of estoppel or a positive rule of the law merchant was much doubted in *Swan v. North British Australasian Land Co.* in the Court below, 7 H. & N. 603, 31 L. J. Ex. 425. In the present judgment the Court of C. P. seems to incline to the latter view.

(b) L. R. 4 C. P. at p. 712.

(c) Cp. *Simons v. Great Western Ry. Co.* 2 C. B. N. S. 620, where the plaintiff was held not bound by a paper of special conditions limiting the company's responsibility as carriers, which he had signed without reading it, being in

fact unable at the time to read it for want of his glasses, and being assured by the railway clerk that it was a mere form. "The whole question was whether the plaintiff signed the receipt knowing what he was about": per Cockburn, C. J. at p. 624. Where a person intending to execute his will has by mistake executed a wrong document, such document cannot be admitted to probate even if the real intention would thereby be partially carried out: *In the Goods of Hunt*, L. R. 3 P. & D. 250.

(d) 3 M. & K. 699.

mortgage-money." Lord Brougham expressed a positive opinion that a plea of *non est factum* would have been sustained at law under these circumstances (a). But his decision rested also on the defendant having constructive notice of the fraud, and no costs were given to the plaintiff, her conduct being considered not free from negligence.

Vorley v.
Cooke.

In *Vorley v. Cooke* (b) there were cross suits for foreclosure and for cancellation of the mortgage deed. The alleged mortgagor had executed the mortgage deed at the instance of his solicitor, believing it to be a covenant to produce deeds. This mortgage so obtained was assigned to a purchaser for valuable consideration without notice, against whom, according to the universal rule above noticed (p. 387) no relief could have been given had the deed been only voidable. It was held that the deed was wholly void and no estate passed by it, and decreed accordingly that it must be delivered up to be cancelled. The similar decision

Ogilvie v.
Jeaffreson;
qu. if con-
sistent.

in *Ogilvie v. Jeaffreson* (c) goes farther. For there the plaintiff, being a mortgagee, executed assignments of the mortgaged premises which were misrepresented to him as leases. He did therefore intend to convey some interest in the property, though not the same interest, nor to the same persons, as appeared by the deeds. And the case, so far as it decided that these deeds were absolutely void, seems not consistent with the limitation laid down in *Thoroughgood's* case (p. 401 above) and recently affirmed by the Court of Appeal in Chancery.

"When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then a deed so executed,

(a) 3 M. & K. at pp. 717, 718 : (but see the following note). The M. R. seems to have thought the estate did pass (p. 713). Hence the variance between the form of the decree affirmed and Lord Brougham's view of the case. Stuart, V.-C.'s remark (2 Giff. 381) applies to the M. R.'s judgment, not to Lord Brougham's.

(b) 1 Giff. 230 : and see the reporter's note, p. 237. This decision

seems to be within the authority of *Thoroughgood's* case (which curiously enough was not cited), at all events as since construed in *Foster v. Mackinnon*. However, James, L. J. has intimated an opinion that a plea of *non est factum* could not have been sustained at law either here or in *Kennedy v. Green* : *Hunter v. Walters*, 7 Ch. at p. 84.

(c) 2 Giff. 353.

although it may be voidable upon the ground of fraud, is not a void deed" (a).

Empson's case (b) seems distinguishable. There the applicant bought land of a building society and executed without examination mortgage deeds prepared by the society's solicitor to secure the price. These deeds contained recitals that he was a member, and treated the whole transaction as an advance by the society to one of its own members. He was never admitted or otherwise treated as a member. The Court held that he was not a contributory in the winding up of the society. Here the matter of the fictitious recitals was collateral to the main purpose of the transaction. Observe that so far as the deed professed to treat Empson as a shareholder it was void, not only voidable: otherwise it would have been too late to repudiate the shares after the winding up order.

It has been laid down that a man of business who executes "an instrument of a short and intelligible description cannot be permitted to allege that he executed it in blind ignorance of its real character" (c). But probably this is to be taken as an inference of fact rather than a statement of law; meaning not that the party is estopped in law from offering evidence to this effect, but that under such conditions his own evidence is practically worth nothing.

We must here revert to the doctrine already stated in Ch. II. Distinction as to agreements of drunken man or lunatic. p. 80, that the contract of a lunatic or a drunken man is not absolutely void but only voidable: for it seems at first sight not consistent with the principles recognized by the Court of Common Pleas in *Foster v. Mackinnon* (*supra*, p. 402). It was in fact held by Lord Ellenborough (d) that "an agreement signed by a person in a state of complete intoxication is void, for such a person has no agreeing mind," and the judges of the Court of

(a) *Hunter v. Walters*, 7 Ch. 75; per Mellish, L. J. at p. 88. The attempt might possibly be made to distinguish *Ogilvie v. Jeaffreson* on the ground that in that case the grantor was in complete error, if not as to the contents and substance of his grant, yet as to the person of the grantee: whereas in *Hunter v. Walters* the conveying parties knew not only that they were

conveying some interest in the property their deed purported to deal with, but that they were conveying it to Walters. But such a distinction seems hardly tenable.

(b) 9 Eq. 597, where no authorities appear to have been cited.

(c) Per Lord Chelmsford, C. *Wythes v. Labouchere*, 3 De G. & J. 593, 601.

(d) *Pitt v. Smith*, 3 Camp. 33.

Exchequer were at least inclined to the same view in *Gore v. Gibson* (a). However it is now settled, as we have seen, by the decisions in *Molton v. Camroux* (b) and *Matthews v. Baxter* (c) that the agreement of a lunatic or drunken man known to be so by the other party is not a void agreement, but a voidable contract which after he becomes sober he may ratify so as to make it binding on the other party, and therefore on himself also. It is obviously reasonable that one who offers to contract with a drunken man or a madman, knowing his condition, should do so at his peril. If the drunkenness or lunacy be not actually or presumably known to the other party the contract is valid: for a man who is apparently sane or sober cannot be supposed absolutely incapable of knowing what he is about. But except in this case the other party must be able to see that it is at least doubtful whether the man is capable of understanding the effect of a contract; if he chooses to disregard that doubt, he cannot afterwards complain of being taken at his word. He is in a manner estopped from saying that by reason of the other's incapacity there is no contract which can be made binding on either of them. The law says to him: You offer to contract with a man whom you have reason to believe incapable of contracting: and if he chooses to hold you to the bargain when he comes to his right mind, it does not lie in your mouth to say there was no contract because he did not understand what he was about. If you thought he did understand it, you cannot complain of being in the same situation as if such had been the fact. If you knew he did not understand it, then (unless you meant to commit a fraud by taking an unfair advantage of his condition) you were careless enough to take the risk of his repudiating the contract, or you thought the mere chance of a ratification worth having: still less can you complain in that case that the contract is ratified instead of being repudiated. And you have the correlative benefit of being able to sue on the contract if it is ratified (c), or even if it is not repudiated within a reasonable time.

Error as
to legal

There may also be a fundamental error affecting not the whole

(a) 13 M. & W. 623, 14 L. J. Ex. 17; 18 L. J. Ex. 68, 356.
151. (c) L. R. 8 Ex. 132.
(b) 2 Ex. 487, in Ex. Ch. 4 Ex.

substance of the transaction, but only its legal character. It is apprehended that on principle a case of this kind must be treated in the same way as those we have already considered : that is, if the two parties to a transaction contemplate wholly different legal effects, there is no agreement : but this will not prevent an act done by either party from having any other effect which it can have by itself and which it is intended to have by the party doing it.

Thus if A. gives money to B. as a gift, and B. takes it as a loan, B. does not thereby become A.'s debtor (a), but the ownership of the money is not the less effectually transferred to B. (b). Or "if A. sends a case of wine to B. intending to sell it, but fails to communicate his intention, and B. honestly believing it to be a gift consumes it, there is no ground for holding B. to be responsible for the price either in law or equity, if he be blameless for the mistake" (c).

We have seen however (p. 391) that mistake as to any particular effect of a contract depending on its true construction does not discharge the contracting party, or entitle him to act upon his own erroneous construction.

B. Error as to the person of the other party.

*Error in
persona.*

Another kind of fundamental error is that which relates to the person with whom one is contracting. This prevents any real agreement from being formed, at least in all cases where it

(a) But if B. communicates to A. his intention of treating the money as a loan, and A. assents, then there is a good contract of loan. See *Hill v. Wilson*, 8 Ch. 888 ; per Mellish, L. J. at p. 896 : where it was held that an advance at first intended to be a gift had in this way been turned into a loan, and was a good consideration for a promissory note subsequently given for the amount.

(b) Savigny, Syst. 3. 269 ; D. 44. 7. de o. et a. 3 § 1. Non satis autem est dantis esse numos et fieri accipientis, ut obligatio nascatur, sed etiam hoc animo dari et accipi ut obligatio constituatur. Itaque si quis pecuniam suam donandi causa

dederit mihi, quamquam et donantis fuerit, et mea fiat, tamen non obligabor ei, quia non hoc inter nos actum est. As to the transfer of the property being effectual cp. D. 41. 1. de acq. rer. dom. 36. The reason is that to that extent there is an intention free from error on the one part and an assent on the other. But a wholly mistaken handing over of money or goods passes no property : *Reg. v. Middleton*, L. R. 2 C. C. R. 38, 44 ; *Kingsford v. Merry* (Ex. Ch.), 1 H. & N. 503, 26 L. J. Ex. 83.

(c) Benjamin on Sale, 326 : cp. the somewhat similar case put by Bramwell, B. in *Reg. v. Middleton*, L. R. 2 C. C. R. at p. 56.

is material for the one party to know who the other is (a). Such knowledge is in fact not material in a great part of the daily transactions of life, as for instance when goods are sold for ready money, or when a railway traveller takes his ticket: and then a mere absence of knowledge caused by complete indifference as to the personality of the other party cannot be considered as mistake, and there can hardly be any question of this kind. But generally speaking, the intention of a contracting party is to create an obligation between himself and another certain person, and if that intention fails to take its proper effect, it cannot be allowed to take the different effect of involving him without his consent in a contract with some one else.

Boulton v. Jones.

There is a curious modern case in the Court of Exchequer which shows the general principle very clearly. An order for goods had been addressed by the defendants to a trader named Brocklehurst who without their knowledge had transferred his business to the plaintiff Boulton. The plaintiff supplied the goods without notifying the change, and after the goods had been accepted sent an invoice in his own name, whereupon the defendants said they knew nothing of him. It was held that there was no contract, and that he could not recover the price of the goods; though possibly the person for whom the order was meant might have adopted the transaction if he had thought fit. The defendants might have had a set-off against the person with whom they intended to contract (b).

Mitchell v. Lapage.

A similar case was *Mitchell v. Lapage* (not cited in *Boulton v. Jones* (c)). The action was assumpsit for not accepting goods. A change had taken place in the seller's firm, and the broker had by mistake given the old name instead of the new one. Gibbs, C. J. ruled as follows: "I agree with the defendant's counsel that he cannot be prejudiced by the substitution. Metcalfe [the broker] has misdescribed the names of his principals; and if by this

(a) Savigny, Syst. 3. 269. If I take a loan from A. thinking he is B.'s agent to lend me the money when he is in truth C.'s there is no contract of loan, though C. may get back his money by *condictio* (analogous to our action for money had and received): D. 12. 1. de reb.

cred. 32.

(b) *Boulton v. Jones*, 2 H. & N. 564, 27 L. J. Ex. 117. Mr. Benjamin's remarks on this case are considered in an Appendix to the present chapter.

(c) Holt N. P. 253.

mistake the defendant was induced to think that he entered into a contract with one set of men and not with any other, and if owing to the broker he has been prejudiced or excluded from a set-off, it would be a good defence." It appeared however on the facts in this case that the defendants had elected to treat the contract as subsisting after notice of the change : and the contract seems to have been considered as voidable at the option of the buyer rather than as absolutely void. Again, if a man enters into a continuing contract with one of two partners alone, not knowing of the existence of the partnership, and the partner with whom the contract was made retires from the business, then the continuing and previously undisclosed partner cannot insist on the further performance of the contract even by joining the name of the original contractor with his own as plaintiff. When it had become impossible for the contract to be performed by the person with whom it was actually made, "the defendant had a right to object to its being performed by any other person" (a). This case was referred to with approval in *Hunter v. Humble* (b), where Lord Denman said : "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract." Again, if A. means to sell goods to B., and C. obtains delivery of the goods by pretending to be B.'s agent to make the contract and receive the goods (c) ; or if C. obtains goods from A. by using the name of B., a customer already known to A., or one only colourably differing from it (d), there is not a voidable contract between A. and C., but no contract at all ; no property passes to C., and he can transfer none (save in market overt) even to an innocent purchaser.

Whether any analogous doctrine applies to deeds is a question on which there does not seem to be any clear authority. We have seen that if a man seals and delivers (at any rate without culpable negligence) a parchment tendered to him as being a

Probably the principle cannot be extended to deeds.

(a) *Robson v. Drummond*, 2 B. & Ad. 303 ; per Lord Tenterden, C. J. p. 307.

(b) 12 Q. B. 310, 317.

(c) *Hardman v. Booth*, 1 H. & C. 803, 32 L. J. Ex. 105 ; cp. *Kingsford v. Merry*, 1 H. & N. 503, 26

L. J. Ex. 83 ; *Hollins v. Fowler*, L. R. 7 H. L. 757, 763, 795.

(d) *Lindsay v. Cundy*, (C. A.) 2 Q. B. D. 96, revg. a. c. 1 Q. B. D. 348 ; *Ex parte Barnett*, 3 Ch. D. 123.

conveyance of his lands of Whiteacre, which is in fact a conveyance of his lands of Blackacre, it is not his deed and no estate passes. It might be argued that there is no reason why the insertion of a wrong party, if material, should not have the same result as the insertion of wrong parcels: and that if a man executes a conveyance of Whiteacre to A. as and for a conveyance of the same estate to B. it is equally not his deed. But the judgment in *Hunter v. Walters* (a) is certainly adverse to such a view.

Satisfaction by a stranger to the contract.

It is on the same principle that a party to whom anything is due under a contract is not bound to accept satisfaction from any one except the other contracting party in person where the nature of the contract requires it (b), or otherwise by himself, his personal representatives, or his authorized agent: and it has even been thought that the acceptance of satisfaction from a third person is not of itself a bar to a subsequent action upon the contract. It seems that the satisfaction must be made in the debtor's name in the first instance and be capable of being ratified by him (c), and that if it is not made with his authority at the time there must be a subsequent ratification, which however need not be made before action (d).

But these refinements have not been received without doubt (e): and it is submitted that the law cannot depart in substance, especially now that merely technical objections are so little favoured, from the old maxim "If I be satisfied it is not reason that I be again satisfied" (f).

Assignment of contracts.

So far the rule of common law. The power of assigning contractual rights which has long been recognized in equity, and

(a) 7 Ch. 75; *supra*, p. 404.

(b) See *Robinson v. Davison*, L. R. 6 Ex. 209.

(c) *James v. Isaacs*, 12 C. B. 791; *Lucas v. Wilkinson*, 1 H. & N. 420, 26 L. J. Ex. 13.

(d) *Simpson v. Eggington*, 10 Ex. 845 (ratification by plea of payment or at the trial may be good).

(e) See per Willes, J. in *Cook v. Lister*, 13 C. B. N. S. 594, 32 L. J. C. P. 121, who considered the doctrine laid down in *Jones v. Broadhurst* (next note) that payment by a

stranger is no payment till assent, as contrary to a well known principle of law: the civil law being the other way expressly, and mercantile law by analogy: at the least assent ought to be presumed (cp. 10 Ch. 416).

(f) Fitzh. Ab. tit. Barre, pl. 166, repeatedly cited in the modern cases where the doctrine is discussed. See in addition to those already referred to, *Jones v. Broadhurst*, 9 C. B. 193, *Belshaw v. Bush*, 11 C. B. 191, 267.

which under the Judicature Act 1873 (s. 25, sub-s. 6) will in future be recognized as effectual in law, does not constitute a direct exception. For we are now concerned only to ascertain the existence or non-existence of a binding contract in the first instance. But on the other hand the limits set to this power (which we have already considered under another aspect) (a) may be again shortly referred to as illustrating the same principle.

Generally speaking, the liability on a contract cannot be transferred so as to discharge the person or estate of the original contractor unless the creditor agrees to accept the liability of another person instead of the first (b).

The benefit of a contract can generally be transferred without the other party's consent, yet not so as to put the assignee in any better position than his assignor. Hence the rule that the assignee is bound by all the equities affecting what is assigned.

Hence also the "rule of general jurisprudence, not confined to choses in action . . . that if a person enters into a contract, and without notice of any assignment fulfils it to the person with whom he made the contract, he is discharged from his obligation" (c), and the various consequences of its application in the equitable doctrines as to priority being gained by notice.

Again, rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided. Thus one partner cannot transfer his share so as to force a new partner on the other members of the firm without their consent: all he can give to an assignee is a right to receive what may be due to the assignor on the balance of the partnership accounts, and if the

Rights founded on personal confidence cannot be assigned.

(a) Ch. V., *supra*, p. 204, sqq.

(b) See p. 189 above. The exceptions to this are but partial. Thus the assignor of leaseholds remains liable on his express covenants: 1 Wms. Saund. 298. A stronger case is the transfer of shares in a company not fully paid up: but the special statutory

law governing these transactions has not altogether lost sight of the principles of the general law: for (1) the transferor is not immediately discharged: (2) the company is not always bound to register the transfer.

(c) Per Willes, J. *De Nicholls v. Saunders*, L. R. 5 C. P. at p. 594.

partnership is at will, the assignment dissolves it ; if not, the other partners may treat it as a ground for dissolution (*a*).

In the same way a contract of apprenticeship is *prima facie* a strictly personal contract with the master ; this construction may be excluded however by the intention of the parties, *e.g.* if the master's executors are expressly named (*b*), or by custom (*c*).

So if an agent appoints a sub-agent without authority, the sub-agent so appointed is not the agent of the principal and cannot be an accounting party to him (*d*). A peculiar case involving a similar question was *Stevens v. Benning* (*e*). It was there held that a publisher's contract with an author was not assignable without the author's consent. The plaintiffs, who sought to restrain the publication of a new edition of a book, claimed under instruments of which the author knew nothing, and which purported to assign to them all the copyrights, &c., therein mentioned (including the copyright of the book in question) and all the agreements with authors, &c., in which the assignors, with whose firm the author had contracted, were interested. It was decided (1) that the instrument relied on did not operate as an assignment of the copyright, because on the true construction of the original agreement with the publishers the author had not parted with it : (2) that it did not operate as an assignment of the contract, because it was a personal contract, and it could not be indifferent to the author into whose hands his interests under such an engagement were entrusted. In the plaintiffs, however trustworthy, the author had not agreed or intended to place confidence : with them, however respectable, he had not intended to associate himself (*f*).

Peculiarities in law of agency.

The law of agency, which we have already had occasion to consider (*g*), presents much more important and peculiar exceptions. Here again we find that the limitations under which

(*a*) Lindley, 1. 717-720. In the same way a sub-partner has no rights against the principal firm.

(*b*) *Cooper v. Simmons*, 7 H. & N. 707, 31 L. J. M. C. 138.

(*c*) Bac. Abr. Master and Servant, E.

(*d*) *Cartwright v. Hateley*, 1 Ves.

jun. 292. Cp. Indian Contract Act, 1872, s. 193.

(*e*) 1 K. & J. 168, 6 D. M. G. 228.

(*f*) See 1 K. & J. at p. 174, 6 D. M. G. at p. 229.

(*g*) Appendix to Ch. V., p. 224, above.

those exceptions are admitted show the influence of the general rule ; thus a party dealing with an agent for an undisclosed principal is entitled as against the principal to the benefit of any defence he could have used against the agent.

C. *Error as to the subject-matter.*

Error as to
subject-
matter.

There may be fundamental error concerning :

A. The specific thing supposed to be the subject of the transaction.

B. The kind or quantity by which the thing is described ; or some quality which is a material part of the description of the thing, though the thing be specifically ascertained.

The question however is in substance always the same, and may be put in this form : It is admitted that the party intended to contract in this way for something ; but is this thing that for which he intended to contract ? The rule governing this whole class of cases is fully explained in the judgment of the Court of Queen's Bench, in the case of *Kennedy v. Panama, &c., Mail Company* (a). There were cross actions, the one to recover instalments paid on shares in the company as money had and received, the other for a call on the same shares. The contention on behalf of the shareholder was "that the effect of the prospectus was to warrant to the intended shareholders that there really was such a contract as is there represented (b), and not merely to represent that the company *bona fide* believed it ; and that the difference in substance between shares in a company with such a contract and shares in a company whose supposed contract was not binding was a difference in substance in the nature of the thing ; and that the shareholder was entitled to return the shares as soon as he discovered this, quite independently of fraud, on the ground that he had applied for one thing and got another" (c).

The Court allowed it to be good law that if the shares applied for were really different in substance from those allotted, this contention would be right. But it is an important part of the

(a) L. R. 2 Q. B. 580.

(b) A contract with the post-master-general of New Zealand on behalf of the Government, which

turned out to be beyond his authority.

(c) Per Cur. at p. 586.

doctrine, both in our own law and in the civil law (a); that the difference in substance must be complete. In the case of fraud, a fraudulent representation of any fact material to the contract gives a right of rescission; but the misapprehension which prevents a valid contract from being formed must go to the root of the matter. In this case the misapprehension was not such as to make the shares obtained substantially different from the shares described in the prospectus and applied for on the faith of that description (b). It was at most like the purchase of a chattel with a collateral warranty, where a breach of the warranty gives an independent right of action, but in the absence of fraud is no ground for rescinding the contract (c).

In the particular case of taking shares in a company the contract is not in any case void, but only voidable at the option of the shareholder if exercised within a reasonable time: this, although in strictness an anomaly, is required for the protection of the company's creditors, who are entitled to rely on the register of shareholders (d).

We also reserve for the present the question how the legal result is affected when the error is due to a representation made by the other party. The exposition of the general principle, however, is not the less valuable: and we now proceed to give instances of its application in the branches already mentioned.

Sub-
divisions:
Error in
corpore.
Ambigu-
ous name.

a. Error as to the specific thing (*in corpore*). The most striking recent case of this kind is *Raffles v. Wichelhaus* (e). The declaration averred an agreement for the sale by the plaintiff to the defendants of certain goods, to wit, 125 bales of Surat cotton, to arrive ex "*Peerless*" from Bombay, and arrival of the goods by the said ship: Breach, non-acceptance. Plea, that the defendants meant a ship called the "*Peerless*" which sailed

(a) P. 588, citing D. 18. 1. de cont. emt. 9, 10, 11. By a clerical error the fragment of Ulpian (*h. t.* 1. 14) "*Si aes pro auro veneat, non valet,*" &c., is ascribed to Paulus in the report.

(b) So, where new stock of a company is issued and purchased on the supposition that it will have a preference which in fact the company had no power to give to it,

this does not amount to a generic difference between the thing contracted for and the thing purchased: *Eaglesfield v. Marquis of Londonderry*, 3 Ch. D. 693.

(c) *Street v. Blay*, 2 B. & Ad. 456.

(d) See cases cited p. 418, *infra*.

(e) 2 H. & C. 906; 33 L. J. Ex. 160.

from Bombay in October, and that the plaintiff offered to deliver, not any cotton which arrived by that ship, but cotton which arrived by a different ship also called the "Peerless" and which sailed from Bombay in December. The plea was held good, for "The defendant only bought that cotton which was to arrive by a particular ship;" and to hold that he bought cotton to arrive in any ship of that name would have been "imposing on the defendant a contract different from that which he entered into" (a).

With this may be compared *Phillips v. Bistolli* (b). The principal question was whether there had been a sufficient acceptance within the Statute of Frauds of certain goods bought at an auction: the decision was that under the circumstances this ought to have been left as a question of fact to the jury, and that there must be a new trial. The jury had found *that there was no mistake* (no other question having been left to them): and it seems to have been admitted that if there had been an innocent mistake on the part of the buyer as to the lot being sold or the price he was agreeing to give, there would even independently of the Statute have been no contract (c). In *Malins v. Freeman* (d) specific performance was refused against a purchaser who had bid for and bought a lot different from that he intended to buy: but the defendant had acted with considerable negligence, and the question was left open whether there was not a valid contract on which damages might be recovered at law. The case of *Calverley v. Williams* (e) shows clearly however that the same principle is fully recognized by courts of equity. The description of an estate sold by auction included a piece which appeared not to have been in the contemplation of the parties, and the purchaser was held not to be entitled to a conveyance of this part. "It is impossible to say, one shall be forced to give that price for part only, which he intended to give for the whole, or that the other shall be obliged

(a) Per Pollock, C. B. and Martin, B. 2 H. & C. at p. 907.

(b) 2 B. & C. 511.

(c) The question whether there is an implied warranty of title on a sale of chattels (*Eichholz v. Bannister*, 17 C. B. N. S. 708, 34 L. J. C. P. 105; see Benjamin on Sale, 518) is not without its analogy to this

class of cases. Cp. the judgment of Willes J. (dissenting) in *Bagueley v. Hawley*, L. R. 2. C. P. 625, 629, that "the thing which the defendant sold was a boiler and not a lawsuit."

(d) 2 Kee. 25.

(e) 1 Ves. jun. 210.

*Harris v.
Pepperell,
&c.*

to sell the whole for what he intended to be the price of a part only. . . . The question is, does it appear to have been the common purpose of both to have conveyed this part?" So in *Harris v. Pepperell* (a), where the vendor had actually executed a conveyance including a piece which he had not intended to sell, but which the defendant maintained he had intended to buy: the Master of the Rolls, acting in accordance with his own former decision in *Garrard v. Frankel* (b), gave the defendant an option to have the whole contract annulled or to take it in the form which the plaintiff intended. The converse case occurred in *Bloomer v. Spittle* (c), where a reservation had been introduced by mistake. The principle of these cases seems to be that the Court will not hold the plaintiff bound by the defendant's acceptance of a supposed offer which was never really made, nor yet require the defendant to accept the real offer which was never effectually communicated to him, and which he perhaps would not have consented to accept; but will put the parties in the same position as if the original offer were still open (d).

The Court having come to the conclusion that the parties did not rightly understand each other, "it is not possible without consent to make either take what the other has offered" (e).

The case of *Dacre v. Gorges* (f), though shortly reported and no reasons given for the judgment, appears to belong to this class. The plaintiff and others, tenants in common, had agreed upon a partition, the allotments to be ascertained on a valuation by surveyors. Certain land to which the plaintiff was solely entitled was by mistake included in the valuation and in the allotment made to the plaintiff, so that the plaintiff thereby got less than her due share of the rest. The allotments were conveyed according to this distribution, and the mistake not dis-

(a) 5 Eq. 1.

(b) 30 Beav. 445.

(c) 13 Eq. 427.

(d) For the principle of these decisions compare *Clowes v. Higginson* (next note) and *Leyland v. Illingworth* (2 D. F. J. 252-3). In *Scott v. Littledale*, 8 E. & B. 815, 27 L. J. Q. B. 201 (a case on an equitable plea), the point of mistake (*viz.* the vendors of a specific cargo showing the purchaser a sample which in fact was of a different bulk) did not

go to the essence of the contract: the correspondence of the bulk to the sample was only a collateral term which the purchaser might waive if he chose. The vendors, therefore, were at all events not entitled to rescind the contract unconditionally.

(e) *Clowes v. Higginson*, 1 Ves. & B. 524, 535.

(f) 2 S. & St. 454: it does not appear how the lapse of time (eleven years) was explained.

covered till several years later. Specific restitution was then impossible, parts of the other allotments having been sold. But a suit was instituted for a money compensation against the only one of the other tenants in common who refused it, and it was held a plain case for relief.

Obviously there was never any agreement on the plaintiff's part to be bound by an allotment which treated her sole property as common property.

Similarly, "where the terms of the contract are ambiguous, and where, by adopting the construction put upon them by the plaintiff, they would have an effect not contemplated by the defendant, but would compel him to include in the conveyance property not intended or believed by him to come within the terms of the contract," and the plaintiff refuses to have the contract executed in the manner in which the defendant is willing to complete it, specific performance cannot be granted (a). Ambiguous terms of contract.

When the purchaser erroneously but not unreasonably supposes a portion of property to be included which is of no considerable quantity, but such as to enhance the value of the whole, this is a "mistake between the parties as to what the property purchased really consists of" so material that the contract will not be enforced (b).

If property not intended to be sold is included in a contract for sale by the ignorance or neglect of the vendor's agent, a court of equity will not interfere either to enforce or to rescind the contract (c).

It has been held in equity in *Ship's* case (d) and others following it (e) that a material variance between the objects of a company as described in the prospectus and in the memorandum of association will entitle a person who has taken shares on the faith of the prospectus to say that the concern actually started is not that in which he agreed to become a partner, and to have his name removed from the register. But these decisions As to shares:
Ship's ca., &c.

(a) *Baxendale v. Scale*, 19 Beav. 601. Cp. per Lord Eldon, *Stewart v. Alliston*, 1 Mer. 26, 33; and per Sir W. Grant, *Higginson v. Clowes*, 15 Ves. 516, 524.

(b) *Denny v. Hancock*, 6 Ch. 1, 14.

(c) *Alvanley v. Kinnaird*, 2 Mac.

& G. 1, 8. Cp. *Griffiths v. Jones*, 15 Eq. 279.

(d) 2 D. J. S. 544.

(e) *Webster's* case, 2 Eq. 741; *Stewart's* case, 1 Ch. 574; see Lindley on Partnership, 1. 109-121.

Not approved in H. L.

have been disapproved of in the House of Lords on the ground that "persons who have taken shares in a company are bound to make themselves acquainted with the memorandum of association, which is the basis upon which the company is established" (a). The rights and liabilities of persons taking shares in companies are indeed altogether of a peculiar kind; and the imposition of this special duty upon them does not affect the general truth of the principle now being considered.

Error in distinguishing numbers of shares not material.

It has also been attempted to dispute the validity of a transfer of shares because the transferor had not the shares corresponding to the numbers expressed in the transfer, although he had a sufficient number of other shares in the company; but it was held that the transferee, who had in substance agreed to take fifty shares in the company, could not set up the mistake as against the company's creditors (b). "The numbers of the shares are simply directory for the purposes (c) of enabling the title of particular persons to be traced; but one share, an incorporeal portion of the profits of the company, is the same as another, and share No. 1 is not distinguishable from share No. 2 in the same way as a grey horse is distinguishable from a black horse" (d).

Error as to kind, &c.

β. Error as to kind, quantity, or quality of the thing.

A material error as to the kind, quantity, or quality of a subject-matter which is contracted for by a generic description (whether alone or in addition to an individual description) may make the agreement void, either because there was never any real consent of the parties to the same thing, or because the thing or state of things to which they consented does not exist or cannot be realized.

Genus:

In *Thornton v. Kempster* (e) the common broker of both

(a) Per Lord Chelmsford, *Oakes v. Turquand*, L. R. 2 H. L. 325, 351. See acc. *Kent v. Freehold Land Co.* 3 Ch. 493; *Hare's* ca. 4 Ch. 503; *Challis's* ca. 6 Ch. 266: all shewing that the contract is in such cases not void, but only voidable at the option of the shareholder, which must be exercised within a reasonable time. So, a person who applies for shares in a company not described as limited cannot afterwards be

heard to say that he did not mean to take shares in an unlimited company: *Perrett's* ca. 15 Eq. 250.

(b) *Ind's* ca. 7 Ch. 485.

(c) *Sic* in the report.

(d) Or house No. 2 in a street from house No. 4 in the same street, though of the same description and in equally good repair: *Leach v. Mullett*, 3 Car. & P. 115, Dart V. & P. 139.

(e) 5 Taunt. 786.

parties gave the defendant as buyer a sale note for *Riga Rhine* hemp, but to the plaintiff as seller a note for *St. Petersburg* clean hemp. The bought and sold notes were the only evidence of the terms of the sale. The Court held that "the contract must be on the one side to sell and on the other side to accept one and the same thing": here "the parties so far as appeared had never agreed that the one should buy and the other accept the same thing; consequently there was no agreement subsisting between them."

Thornton v. Kempster.

In a case of this kind however there is not even an agreement in terms between the proposal and the acceptance.

A curious case of error in quantity happened in *Henkel v. Quantity. Pape (a)*, where by the mistake of a telegraph clerk an order intended to be for three rifles only was transmitted as an order for fifty. The only point in dispute was whether the defendant was bound by the message so transmitted, and it was held that the clerk was his agent only to transmit the message in the terms in which it was delivered to him. The defendant had accepted three of the fifty rifles sent, and paid the price for them into Court: therefore the question whether he was bound to accept any did not arise in this case. It is settled however by former authority that when goods ordered are sent together with goods not ordered, the buyer may refuse to accept any, at all events "if there is any danger or trouble attending the severance of the two" (b).

The principle of error in quantity preventing the formation of a contract is applicable to an error as to the price of a thing sold or hired (c). As there cannot be even the appearance of a contract when the acceptance disagrees on the face of it with the proposal, this question can arise only when there is an unqualified acceptance of an erroneously expressed or understood

(a) L. R. 6 Ex. 7.

(b) *Levy v. Green*, 8 E. & B. 575, in Ex. Ch. 1 E. & E. 969; 27 L. J. Q. B. 111, 28 *ib.* 319; per Byles, J. 1 E. & E. at p. 976; and cp. *Hart v. Mills*, 15 M. & W. 85, where a new contract was implied as to part of the goods which was retained: but in that case the quality as well as the

quantity of the goods sent was not in conformity with the order.

(c) D. 19. 2. locati, 52. Si decem tibi locem fundum, tu autem existimes quinque te conducere, nihil agitur. Sed et si ego minoris me locare sensero, tu pluris te conducere, utique non pluris erit conductio quam quanti ego putavi.

proposal. Such a case occurred in *Webster v. Cecil* (a), where the defendant sent a written offer to sell property and wrote 1,100*l.* for 1,200*l.* by a mistake in a hurried addition of items performed on a separate piece of paper. This paper was kept by him and produced to the Court. On receiving the acceptance he discovered the mistake and at once gave notice of it. Under these circumstances specific performance was refused. If the origin of the mistake had not been clear, or if there had been any delay in giving notice—or, perhaps, if it had not appeared, as it did, that the plaintiff had reason to know the real value of the property, and therefore that the letter he received could not express the defendant's real intention—it is conceived that the defendant could not have been heard to allege that he did not mean what he said (b). As usual in such cases, the decision left the legal rights of the parties open. It is submitted however that the agreement was void at law.

Material
attribute.

But sometimes, even when the thing which is the subject-matter of an agreement is specifically ascertained, the agreement may be avoided by material error as to some attribute of the thing. For some attribute which the thing in truth has not may be a material part of the description by which the thing was contracted for. If this is so, the thing as it really is, namely without that quality, is not that to which the common intention of the parties was directed, and the agreement is void.

An error of this kind will not suffice to make the transaction void unless—

Conditions
necessary
to avoid
transac-
tion on this
ground.

(1) It is such that according to the ordinary course of dealing and use of language the difference made by the absence of the quality wrongly supposed to exist amounts to a difference in kind (c) ;

(2) and the error is also common to both parties.

Thus we read “*Mensam argento coopertam mihi ignorantibus pro solida vendidisti imprudens ; nulla est emptio, pecuniaque eo*

(a) 30 Beav. 62.

(b) This statement would be unqualified but for what was said in *Wycombe Railway Company v. Donnington Hospital*, 1 Ch. 268, 273, by an authority entitled to the highest respect. But surely it cannot be

true as a general proposition that a purchaser is never to have specific performance against a vendor who swears that he understood the contract in a different sense : see *Powell v. Smith*, 14 Eq. 85.

(c) Savigny, Syst. § 137 (3. 283.)

nomine data condicetur" (a). Again, "Si aes pro auro veneat, non valet" (b). "If a bar [is] sold as gold, but [is] in fact brass, the vendor being innocent, the purchaser may recover" (c). This, however, is not to be taken too largely. What does *pro auro*, as and for gold, imply as here used? It implies that the buyer thinks he is buying, and the seller that he is selling, a golden vessel: and further, that the object present to the minds of both parties as that in which they are trafficking—the object of their common intention—is, not merely this specific vessel, but this specific vessel, being golden. Then, and not otherwise, the sale is void.

If the seller fraudulently represents the vessel as golden, knowing that it is not, the sale is (as between them) not void but voidable at the option of the buyer. For if both parties have been in innocent and equal error it would be unjust to let either gain any advantage: but a party who has been guilty of fraud has no right to complain of having been taken at his word; and it is conceivable that it might be for the interest of the buyer to affirm the transaction, as if the vessel supposed by the fraudulent seller to be of worthless base metal should turn out to be a precious antique bronze. Probably the results are the same if the buyer's belief is founded even on an innocent representation made by the seller. This seems to be assumed by the language of the Court in *Kennedy v. Panama &c. Mail Company* (d). We shall recur to this point presently. Or in an ordinary case the buyer may choose to treat the seller's affirmation as a warranty, and so keep the thing and recover the difference in value.

Again, if the sale of the specific vessel is made in good faith with a warranty of its quality, the vendor must compensate the purchaser for breach of the warranty, but the sale is not even voidable. For the existence of a separate warranty shows that the matter of the warranty is not a condition or essential part of the contract, but the intention of the parties was to transfer the property in the specific chattel at all events. Whether a particular affirmation as to the quality of a specific thing sold be

(a) D 18.1. de cont. emt. 41 § 1.

(b) D. eod. tit. 14, cited and adopted by the Court of Q. B. in *Kennedy v. Panama Mail, &c. Co.*, *supra*.

(c) Per Lord Campbell, C. J.

Gompertz v. Bartlett, 2 E. & B. 849, 854, 23 L. J. Q. B. 65.

(d) L. R. 2 Q. B. 580, 587, p. 413, *supra*.

only a warranty, or the sale be "conditional, and to be null if the affirmation is incorrect," is a question of fact to be determined by the circumstances of each case (a).

Error
must be
common.

Accordingly, when the law is stated to be that "a party is not bound to accept and pay for chattels, unless they are really such as the vendor professed to sell, and the vendee intended to buy" (b), the condition is not alternative but strictly conjunctive. A sale is not void merely because the vendor professed to sell, or the vendee intended to buy, something of a different kind. It must be shown that the object was in fact neither such as the vendor professed to sell nor such as the vendee intended to buy.

Smith v.
Hughes.

And so in the case supposed the sale will not be invalidated by the mistake of the buyer alone, if he thinks he is buying gold; not even if the seller believes him to think so, and does nothing to remove the mistake, provided his conduct does not go beyond passive acquiescence in the self-deception of the buyer. In a late case (c) where the defendant bought a parcel of oats by sample believing them to be old oats, and sought to reject them when he found they were new oats, it was held that "a belief on the part of the plaintiff that the defendant was making a contract to buy the oats of which he offered him a sample under a mistaken belief that they were old would not relieve the defendant from liability unless his mistaken belief was induced by some misrepresentation of the plaintiff or con-

(a) See per Wightman, *J. Gurney v. Womersley*, 4 E. & B. 133, 142, 24 L. J. Q. B. 46 : the cases collected in the notes to *Cutter v. Powell*, 2 Sm. L. C. 27 : *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447 ; *Azémar v. Casella*, L. R. 2 C. P. 431, 677. The Roman law is the same as to a sale with warranty : D. 19. 1. de act. emt. 21 § 2. expld. by Savigny, Syst. 3. 287. The whole of Savigny's admirable exposition of so-called *error in substantia* in §§ 137, 138, (3. 276, sqq.) deserves careful study. Of course the conclusions in detail are not always the same as in our law : and the fundamental difference in the rules as to the actual transfer of property in goods sold (as to which see Blackburn on the Contract of

Sale, Part 2, Ch. 3) must not be overlooked. But this does not affect the usefulness and importance of the general analogies.

(b) Per Cur. *Hall v. Conder*, 2 C. B. N. S. 22, 41, 26 L. J. C. P. 138, 143.

(c) *Smith v. Hughes*, L. R. 6 Q. B. 597 : per Cockburn, C. J. p. 603 ; per Hannen, J. p. 610. The somewhat refined distinction here taken does not seem to exist in the civil law. D. 19 1. de act. emt. 11 § 5 : Savigny, 3. 293, according to whom it makes no difference whether there be on the part of the vendor ignorance, passive knowledge, or even actual fraud : the sale being wholly void in any case.

concealment by him of a fact which it became his duty to communicate. In order to relieve the defendant it was necessary that the jury should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that he believed the defendant to believe that he, the plaintiff, was contracting to sell old oats." "There is no legal obligation on the vendor to inform the purchaser that he is under a mistake not induced by the act of the vendor" (a); and therefore the question is whether we have to do merely with a motive operating on the buyer to induce him to buy, or with one of the essential conditions of the contract (b). "Videamus, quid inter eumentem et vendentem actum sit" (c): "the intention of the parties governs in the making and in the construction of all contracts" (d): this is the fundamental rule by which all questions, even the most refined, on the existence and nature of a contract must at last come to be decided.

Another curious case of this class is *Cox v. Prentice* (e). The declaration contained a count in assumpsit as on a warranty, and the common money counts. The nature of the material facts will sufficiently appear by the following extract from the judgment of Bayley, J. :—

"What did the plaintiffs bargain to buy and the defendants to sell? They both understand [*sic*] that the one agreed to buy and the other to sell a bar containing such a quantity of silver as should appear by the assay, and the quantity is fixed by the assay and paid for; but through some mistake in the assay the bar turns out not to contain the quantity represented but a smaller quantity. The plaintiff therefore may rescind the contract and bring money had and received, having offered to return the bar of silver."

And, by Dampier, J. :—"The bargain was for a bar of silver of the quality ascertained by the assay-master, and it is not of that quality. It is a case of mutual error." These judgments went farther than was necessary to the decision (f), for a verdict had been taken only for the difference in value.

(a) *Ibid.* per Blackburn, J. p. 607.

(b) *Ibid.* per Cockburn, C. J.

(c) Julianus in D. 18. 1. de cont. emt. 41 pr.

(d) Per Cur. *Bannerman v. White*, 10 C. B. N. S. 844, 860, 31 L. J. C. P. 28, 32.

(e) 3 M. & S. 344.

(f) And certainly farther than the civil law: see D. 18. 1. de cont. emt. 14, where though a bracelet "quae aurea dicebatur" should be found "magna ex parte aenea," yet "venditionem esse constat ideo, quia auri aliquid habuit."

Cases of
mis-
description
on sales of
real pro-
perty dis-
tinguished.

It is important to distinguish from the cases above considered another class where persons who have contracted for the purchase of real property or interests therein have been held entitled at law (a) as well as in equity (b) to rescind the contract on the ground of a misdescription of the thing sold in some particular materially affecting the title, quantity, or enjoyment of the estate. In some of these cases language is used which, taken alone, might lead one to suppose the agreement absolutely void; and in one or two (e.g. *Torrance v. Bolton*) there is some real difficulty in drawing the line. But they properly belong to the head of Misrepresentation, or else (which may be the sounder view where applicable) (c) are cases where the contract is rather broken than dissolved. A man is not bound to take a house or land not corresponding to the description by which he bought it any more than he is bound to accept goods of a different denomination from what he ordered, or of a different quality from the sample. Mistake or no mistake, the vendor has failed to perform his contract. The purchaser may say: "You offered to sell me a freehold: that means an unincumbered freehold, and I am not bound to take a title subject to covenants" (d): or, "You offered to sell an absolute reversion in fee simple: I am not to be put off with an equity of redemption and two or three Chancery suits (e). I rescind the contract and claim back my deposit." Cases of this kind, therefore, are put aside for the present.

Subject-
matter not
in exist-
ence.

Again, an agreement is void if it relates to a subject-matter contemplated by the parties as existing but which in fact does not exist. Herein, as before, everything depends on the intention of the parties, and the question is whether the existence of

(a) *Flight v. Booth*, 1 Bing. N. C. 370, *Phillips v. Caldcleugh*, L. R. 4 Q. B. 159.

(b) *Stanton v. Tattersall*, 1 Sm. & G. 529, *Earl of Durham v. Legard*, 34 Beav. 611, *Torrance v. Bolton*, 8 Ch. 118. See authorities collected in Dart, V. & P. 114 sqq.

(c) The difference is purely theoretical; for if it be an actual breach of contract the purchaser can recover only nominal damages: *Bain v. Pothergill*, L. R. 7 H. L. 158, confirming *Flureau v. Thornhill*, 2

W. Bl. 1078. The analogy suggested in the text should perhaps be confined to cases where the misdescription goes to matter of title. One cannot compare a specific sale of land to a non-specific sale of goods: but the contract is not merely to sell specific land, but to give a certain kind of title.

(d) *Phillips v. Caldcleugh*, L. R. 4 Q. B. 159.

(e) *Torrance v. Bolton*, 8 Ch. 118: see at p. 124.

the thing contracted for was or was not presupposed as essential to the agreement (a). No precise rule can be laid down for answering this question, though typical cases may be stated by way of illustration. We cannot do better than begin with the rule and illustrations as given in the Indian Contract Act, adding the principal authorities in support of the several positions. The main part of s. 20 is as follows :

Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. Indian Contract Act, s. 20.

The illustrations are these :—

a. A. agrees to sell to B. a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts. The agreement is void.

This was in substance the decision of the House of Lords in *Couturier v. Hastie* (b), which is always regarded as the leading case on this head. Couturier v. Hastie.

b. A. agrees to buy from B. a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void (c).

In like manner a sale of shares in a company will not be enforced if at the date of the sale a petition for winding up has been presented of which neither the vendor nor the purchaser knew (d). But the ignorance of the buyer only in similar circumstances does not of itself invalidate the sale. It seems however that the sale would be voidable on the ground of fraud if the seller knew of the buyer's ignorance, but that such knowledge should be distinctly and completely alleged (e). An agreement to take new shares in a company which the company has no

Same principle applied to sale of shares.

(a) Cp. Story, Eq. Jur. § 142.

(b) 5 H. L. C. 673.

(c) Pothier, *Contrat de Vente*, § 4, cited 5 H. L. C. 678, says: "Si donc, ignorant que mon cheval est mort, je le vends à quelqu'un, il n'y aura pas un contrat de vente, faute d'une chose qui en soit l'objet." Cp. Code Civ. 1601. "Si au moment de

la vente la chose vendue était périée en totalité, la vente serait nulle :"—Italian Code, 1461.

(d) *Emmerson's* ca. 1 Ch. 433, expld. 3 Ch. 391, per Page Wood, L. J.

(e) *Bowman v. Rudge*, L. R. 3 Q. B. 689, 697.

power to issue is also void, and money paid under it can be recovered back (a).

To annuities and life interests.

c. A. being entitled to an estate for the life of B. agrees to sell it to C. B. was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

This was so held at law in *Strickland v. Turner* (b). There, at the date when the sale of a life annuity was completed, the life had dropped unknown to both vendor and purchaser: it was held that the purchase money might be recovered back as on a total failure of consideration. So in *Hitchcock v. Giddings* (c) a remainderman in fee expectant on an estate tail had sold his interest, a recovery having been already suffered unknown to the parties: a bond given to secure the purchase money was set aside. "Here is an estate which if no recovery had been suffered was a good one. Both parties, being equally ignorant that a recovery had been suffered, agree for the sale and purchase of the estate, and the purchaser is content to abide the risk of a recovery being subsequently suffered. He conceives however he is purchasing something, that he is purchasing a vested interest. He is not aware that such interest has already been defeated. . . . [The defendant] has sold that which he had not—and shall the plaintiff be compelled to pay for that which the defendant had not to give?" (d). More recently, in *Cochrans v. Willis* (e), an agreement had been made between a remainderman and the assignee of a tenant for life of a settled estate, founded on the assignee's supposed right to cut the timber. The tenant for life was in fact dead at the date of the agreement. The Court refused to enforce it, as having been entered into on the supposition that the tenant for life was alive, and only intended to take effect on that assumption. So a life insurance cannot be revived by the payment of a premium within the time allowed for that purpose by the original contract, but after the life has dropped unknown to both insurers and assured, although it was in existence when the premium became due, and although

(a) *Bank of Hindustan v. Alison*, L. R. 6 C. P. 54, in Ex. Ch. *ib.* 222; *Ex parte Alison*, 15 Eq. 394, 9 Ch. 1, 24; *Ex parte Campbell, &c.* 16 Eq. 417, 9 Ch. 1, 12; and see *Lindley*, 2. 1381.

(b) 7 Ex. 208, 22 L. J. Ex. 115.
(c) 4 Pri. (Ex. in Eq.) 135, and better in Dan. 1.
(d) Dan. at p. 7.
(e) 1 Ch. 58.

the insurers have waived proof of the party's health, which by the terms of renewal they might have required: the waiver applies to the proof of health of a man assumed to be alive, not to the fact of his being alive (a).

The case of *Bingham v. Bingham* (b), which was relied on in the argument of *Cochrane v. Willis* and in the judgment of Turner L. J., must be considered as belonging to this class. As in *Cochrane v. Willis* the substance of the facts was that a purchaser was dealing with his own property, not knowing that it was his. This consideration seems to remove the doubt expressed by Story (c), who criticizes it as a case in which relief was given against a mere mistake of law. But, with all respect for that eminent writer, his objection is inapplicable. For the case does not rest on mistake as a ground of special relief at all. There was a total failure of the supposed subject-matter of the transaction, or perhaps we should rather say it was legally impossible. We have already pointed out the resemblance of this class of cases to some of those considered in the last chapter. The one party could not buy what was his own already, nor could the other (in the words of the judgment as reported) be allowed "to run away with the money in consideration of the sale of an estate to which he had no right" (d). So we find it treated in the Roman law quite apart from any question of mistake, except as to the right of recovering back money paid under the agreement. A stipulation to purchase one's own property is "naturali ratione inutilis" as much as if the thing was destroyed, or not capable of being private property (e).

Such an agreement is naught both at law and in equity, without reference to the belief or motive which determined it.

Moreover the difficulty was cleared up by Lord Westbury, though not quite on this broad ground, in a recent case exactly similar in principle. In *Cooper v. Phibbs* (f) A. agreed to take

Purchase of property already one's own. *Bingham v. Bingham*.

Agreement to pay rent for one's

(a) *Pritchard v. Merchants' Life Assurance Society*, 3 C. B. N. S. 622, 27 L. J. C. P. 169.

(b) 1 Ves. Sr. 126, Belt's supp. 79.

(c) Eq. Jurisp. § 124.

(d) The case is considered, among other authorities, and upheld on the true ground, in *Stewart v. Stewart*, 6 Cl. & F. at p. 968; cp. the remarks

of Hall, V.-C. in *Jones v. Clifford*, 3 Ch. D. 779, 790.

(e) Gaius in D. 44. 7. de. obl. et act. 1 § 10. *Suae rei emptio non valet, sive sciens, sive ignorans emptor; sed si ignorans emptor, quod solvero repetere potero, quia nulla obligatio fuit*: D. 18. 1. de cont. empt. 16 pr.

(f) L. R. 2 H. L. 149.

own property :
Cooper v.
Phibbs.

Lord
West-
bury's
explana-
tion of
*ignorantia
juris*.

a lease of a fishery from B., on the assumption that A. had no estate and B. was tenant in fee. Both parties were mistaken at the time as to the effect of a previous settlement ; and in truth A. was tenant for life and B. had no estate at all. It was held that this agreement was invalid. Lord Westbury stated the ground of the decision as follows :—"The result therefore is that at the time of the agreement for the lease which it is the object of this petition (a) to set aside, the parties dealt with one another under a mutual mistake as to their respective rights. The petitioner did not suppose that he was, what in truth he was, tenant for life of the fishery. The other parties acted under the impression given to them by their father that he (their father) was the owner of the fishery and that the fishery had descended to them. In such a state of things there can be no doubt of the rule of a court of equity with regard to the dealing with that agreement. It is said '*Ignorantia juris haud excusat*'; but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact ; it may be the result also of matter of law ; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake. Now that was the case with these parties—the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered and the agreement cannot stand" (b).

Broughton
v. Hutt.

The principle here laid down also covers *Broughton v. Hutt* (c). There the heir at law of a shareholder in a company joined with several other shareholders in giving a deed of indemnity to the directors, believing that the shares had descended to him as real estate, whereas they were personal estate. The deed was held to be void as against him in equity at all events, and probably at law. "The plaintiff never intended to be bound unless he

(a) A Cause Petition in the Irish
Court of Chancery.

(b) L. R. 2 H. L. 170.
(c) 3 De G. & J. 501.

was a shareholder, and the defendants never intended him to be bound unless he was so." Here the mistake was plainly one of fact within Lord Westbury's definition, namely as to the character of the shares by the constitution of the particular company. It is submitted, however, that an erroneous fundamental assumption made by both parties even as to a general rule of law might well prevent any valid agreement from being formed (a).

In the same way an agreement to assign a lease for lives would be inoperative if all the lives had dropped unknown to the parties. But the only thing which the parties can here be supposed, in the absence of expressed condition or warranty, to assume as essential is that the lease is subsisting, that is, that at least one of the lives is, not that they all are still in existence. Where the assignor of a lease for the lives of A., B., and C., expressly covenanted with the assignee that the lease was a subsisting lease for the lives of A. B. and C. and the survivors and survivor of them, this was held to be only a covenant that the lease was subsisting, and not that all the lives were in being at the date of the assignment (b). That is, his contract was interpreted, according to the general practice and understanding of conveyancers, as a contract to transfer an existing lease for three lives, not necessarily a lease for three lives all existing.

Assign-
ment of
lease for
lives.

If in any state of things otherwise resembling those just now discussed we find, instead of ignorance of the material fact on both sides, ignorance on the one side and knowledge on the other, then the matter has to be treated differently. Suppose A. and B. are the contracting parties; and let us denote by X. a fact or state of facts materially connected with the subject matter of the contract, which is supposed by A. to exist, but which in truth does not exist, and is known by B. not to exist. Then we have to ask these questions :—

Results
where only
one party
is ignorant
of the
material
fact.

1. Does A. intend to contract only on the supposition that X. exists? which may be put in another way thus: If A.'s attention were called to the possibility of his belief in the existence of X. being erroneous, would he require the contract to be made conditional on the existence of X.?

(a) Cp. *McCarthy v. Decaix*, 2 Russ. & My. 614.

(b) *Coates v. Collins*, L. R. 6 Q. B. 469, in Ex. Ch. 7 Q. B. 144.

2. If so—Does B. know that A. supposes X. to exist?

3. If B. knows this—Does he also know that A. intends to contract only on that supposition?

If the answer to any one of these questions is in the negative, it seems there is a binding contract (*a*). But it is to be observed that a negative answer to the second question will generally require strong evidence to establish it, and that if this question be answered in the affirmative, an affirmative answer to the third question will often follow by an almost irresistible inference. Thus if a purchaser of a reversionary interest subject to prior life interests knows that one of these has ceased, and nothing is said about it at the time of the contract, then the purchaser can hardly expect anybody to believe either that he himself overlooked the material importance of that fact, or that he was not aware of the vendor's ignorance of it, or that he supposed that the vendor would not treat it as material (*b*). So in the case already cited (*c*) of the sale of shares after a petition for the winding-up of the company had been presented it seems that a distinct allegation in the pleadings that the seller knew of the buyer's ignorance of that fact would have been sufficient to constitute a charge of fraud.

If the questions above stated be all answered in the affirmative, either by positive proof or by probable and uncontradicted presumption from the circumstances, then it may be considered either that the case becomes one of fraud, or at least that the party who knew the true state of the facts, and also knew the other party's intention to contract only with reference to a supposed different state of facts, is precluded from denying that he understood the contract in the same sense as that other, namely as conditional on the existence of the supposed state of facts.

Funda-
mental
error pro-
duced by
misrepre-
sentation.

On a similar principle (as we have already mentioned incidentally) it is certain that where fundamental error of one party is caused by a fraudulent misrepresentation, and probable that where it is caused by an innocent misrepresentation on the part of the other, that other is estopped from denying the validity

(a) *Smith v. Hughes*, L. R. 6 Q. 169.
B. 597 *supra*, p. 422.

(b) See *Turner v. Harvey*, Jac. B. 689.

(c) *Bowman v. Rudge*, L. R. 3 Q.

of the transaction if the party who has been misled thinks fit to affirm it.

Does it follow that the contract is in its inception not void, but voidable at the option of the party misled? Not so: for the fraud or negligence of the other must not put him in any worse position as regards third persons. These, if the transaction be simply voidable, are entitled to treat it as valid until rescinded, and may acquire indefeasible rights under it: if it be void they can acquire none, however blameless their own part in the matter may be (a). Thus there is a real difference between a contract voidable at the option of one party and a void agreement whose nullity the other is estopped as against him from asserting. In the case of contracts to take shares in companies an anomaly is admitted, as we have seen, for reasons of special necessity, and the contract is treated as at most voidable. But even here there must be an original *animus contrahendi* to this extent, that the shareholder was minded to have shares in some company. An application for shares signed in absolute ignorance of its true nature and contents, like the bill in *Foster v. Mackinnon* (a), could not be the foundation of a binding contract to take shares. An allotment in answer to such application would be a mere proposal, and whether it were accepted or not would have to be determined by the ordinary rules of law in that behalf (see Ch. I.).

We may finally call attention to a rule of the law concerning sales by sample which has some analogy to the rules governing this last class of void agreements. The rule in question may be gathered (as Mr. Benjamin has pointed out) from *Heilbutt v. Hickson* (b) and is to this effect: "If a manufacturer agrees to furnish goods according to sample, the sample is to be considered as if free from any secret defect of manufacture not discoverable on inspection and unknown to both parties." Rule in
Heilbutt v.
Hickson
as to sale
by sample.

Here we have a common error as to a material fact, namely the character of the sample itself by which the character of the bulk is to be tested. But it is possible to put the parties in the same position as if their erroneous assumption had been correct,

(a) *Foster v. Mackinnon*, L. R. 4 C. P. 704, *supra*, p. 402.

(b) L. R. 7 C. P. 438; Benjamin on Sale, 533.

and therefore their contract, instead of being avoided, is upheld according to their true intention, *i.e.* as if the sample had been what they both supposed it to be. If they had themselves discovered the mistake in time they would have made the same contract with reference to a proper sample in place of the defective one. The result is thus the converse of that which occurs when the error goes to the matter of the whole agreement, as in the cases we have been considering.

Rights and remedies of party to a void agreement.

It appears from the authorities which have been adduced that one who has been party to an apparent agreement which is void by reason of fundamental error has more than one course open to him.

He may wait until the other party seeks to enforce the alleged agreement and then assert the nullity of the transaction by way of defence (*a*). If he think fit he may also take the opportunity of seeking by counterclaim to have the instrument sued on set aside (*b*).

Or he may right himself, if he prefers it, by coming forward actively as plaintiff. Where he has actually paid money as in performance of a supposed valid agreement, and in ignorance of the facts which exclude the reality of such agreement, he may recover back his money as having been paid without any consideration (the action "for money received" of the old practice) (*c*). He paid on the supposition that he was discharging an obligation, whereas there was in truth no obligation to be discharged.

Moreover he may sue in the Chancery Division, whether anything has been done under the supposed agreement or not, to have the transaction declared void and to be relieved from any possible claims in respect thereof (*d*).

Election to adopt

On the other hand, although he is entitled to treat the

(*a*) As to the proper mode of pleading such a defence under the old practice at common law, see notes (*b*) and (*c*), p. 404 of the first edition of this book.

(*b*) It seems to be necessary for this purpose to obtain a transfer of the action to the Chancery Division: *Mostyn v. West Mostyn Coal and Iron Co.* 1 C. P. D. 145.

(*c*) *E.g.*, *Cox v. Prentice*, 3 M. & S.

348.

(*d*) All causes and matters for (*inter alia*) the setting aside or cancellation of deeds or other written instruments (which formerly belonged to the exclusive jurisdiction of equity) are assigned to the Chancery Division by s. 34 of the Supreme Court of Judicature Act, 1873.

supposed agreement as void, and is not as a rule prejudiced by anything he may have done in ignorance of the true state of the facts, yet after that state of facts has come to his knowledge he may nevertheless elect to treat the agreement as subsisting: or, as it would be more correct to say, he may carry into execution by the light of correct knowledge the former intention which was frustrated by want of the elements necessary to the formation of any valid agreement. It is not that he confirms the original transaction (except in a case where there is also misrepresentation, see p. 431), for there is nothing to confirm, but he enters into a new one. And if his true consent goes with this, he is of course bound, so far as consent can bind him.

It might be thought to follow that in cases within the Statute of Frauds or any other statute requiring certain forms to be observed, we must look not to the original void and improperly so-called agreement, but to the subsequent election or confirmation in which the only real agreement is to be found, to see if the requirements of the statute have been complied with. No express authority has been met with on this point. But analogy is in favour of a deliberate adoption of the form already observed being held sufficient for the purpose of the new contract (a).

PART 3. MISTAKE IN EXPRESSING TRUE CONSENT.

This occurs when persons desiring to express an intention which when expressed carries with it legal consequences have by mistake used terms which do not accurately represent their real intention. As a rule it can occur only when the intention is expressed in writing. It is not impossible to imagine similar difficulties arising on verbal contracts, as for example if the discourse were carried on in a language imperfectly understood by one or both of the speakers. But we are not aware that anything of this kind has been the subject of judicial decision (b). The general result of persons talking at cross purposes is that there is no real agreement at all. This class of cases has already been dealt with. We are now concerned with those where there does exist a real agreement between the parties, only wrongly

Mistake in expressing intention: generally occurs in writing.

(a) *Stewart v. Eddowes*, L. R. 9 C. P. 311; *supra*, p. 146.

(b) See however *Phillips v. Bis-*

telli, 2 B. & C. 511, which comes near the supposed case.

expressed. Such mistakes as we are now about to consider were, even before the Judicature Acts, not wholly disregarded by courts of law; but they are fully and adequately dealt with only by the jurisdiction which was formerly peculiar to courts of equity. We shall see that this jurisdiction is exercised with much caution and within carefully defined limits.

Classification of cases according to the remedies applicable:
 1. General rules of construction.
 2. Special equitable rules of construction.
 3. Special equitable remedies. Clerical errors, &c.

On the whole the cases of mistake in expressing intention fall into three classes:

1. Those which are sufficiently remedied by the general rules of construction.
2. Those which are remedied by special rules of construction derived from the practice of courts of equity.
3. Those which require peculiar remedies administered by the Court in its equitable jurisdiction.

We proceed to take the classes of cases above mentioned in order.

1. General Rules.

Certain simple and obvious forms of mistaken expression can be set right without any special remedies by the ordinary rules of construction which belong equally to common law and equity. Such are all trifling mechanical mistakes, clerical, verbal, or grammatical errors (*a*), omissions which may be supplied with certainty from the context (*b*), and even more substantial errors when the instrument itself affords the means of correcting them. The Court is not bound by the strict meaning of words when the context shows it to be contrary to the true meaning (*c*). It has long been established that "false

(*a*) Cp. per Lord Mansfield (on a will) 3 Burr. 1635; "Every inaccuracy of grammar, every impropriety of terms, shall be corrected by the general meaning, if that be clear and manifest."

(*b*) For a striking case of omission supplied by a court of law in a will see *Doe d. Leach v. Micklem*, 6 East 486, where an alternative clause being imperfect the missing alternative was supplied as obviously omitted: and as to implying an omitted case where there are limitations on alternative contingencies,

Crofton v. Davies, L. R. 4 C. P. 159, *Savage v. Tyers*, 7 Ch. 356, 363. In several recent cases the Court has supplied omitted words (*Bird's tr.* 3 Ch. D. 214) and clauses (*Daniel's sett. tr.* 1 Ch. D. 375, a limitation in favour of daughters as well as sons restored, *Greenwood v. Greenwood*, 5 Ch. D. 954, an omitted life interest supplied by aid of subsequent context); *Redfern v. Bryning*, 6 Ch. D. 133.

(*c*) Per James, L. J. *Greenwood v. Greenwood*, 5 Ch. D. at p. 956.

or incongruous Latin or English seldom or never hurteth a deed: for the rules are, *Falsa orthographia non vitiat chartam. Falsa grammatica non vitiat concessionem.* “*Mala grammatica non vitiat chartam*: neither false Latin nor false English will make a deed void when the intent of the parties doth plainly appear” (a).

Where the length of the term is differently stated in different parts of a lease, the counterpart may be referred to in order to decide which is right, the rule that the *habendum* prevails being only a *prima facie* one (b).

Similar in principle, but of wider scope, is the rule that “greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent” (c). In a modern case in the House of Lords the rule was laid down and acted upon that “both courts of law and of equity may correct an obvious mistake on the face of an instrument without the slightest difficulty” (d). Here a draft agreement for a separation deed had by mistake been copied so as to contain a stipulation that the husband should be indemnified against his own debts: but it was held that the context and the nature of the transaction clearly showed that the wife’s debts were meant, and that in framing the deed to be executed under the direction of the Court in pursuance of the agreement the mistake must be corrected accordingly. So the Court may presume from the mere inspection of a settlement that words which, though they make sense, give a result which is unreasonable and repugnant to the general intention and to the usual frame of such instruments, were inserted by mistake (e).

An agreement has even been set aside chiefly, if not entirely, on the ground that the unreasonable character of it was enough to satisfy the Court that neither party could have understood its true effect: such at least appears to be the meaning of Lord Eldon’s phrase, “a surprise on

(a) Shepp. Touchst. 55, 87: cp. *ib.* 369.

(b) *Burchell v. Clark* (C. A.) 2 C. P. D. 88.

(c) Per Cur. (Ex. Ch.), *Ford v. Beech*, 11 Q. B. at p. 866, 17 L. J. Q. B. at p. 116.

(d) *Wilson v. Wilson*, 5. H. L. C. 40, 66, per Lord St. Leonards, and see his note, V. & P. 171.

(e) *Re De la Touche’s settlement*, 10 Eq. 599, 603; where however the mistake was also established by evidence.

both parties" (a). The agreement itself purported to bind the tenant of a leasehold renewable at arbitrary (and in fact always increasing) fines at intervals of seven years to grant an underlease at a fixed rent with a perpetual right of renewal. The lessor was in his last sickness, and there was evidence that he was not fit to attend to business. Charges of fraud were made, as usual in such cases, but not sustained: the decision might however have been put on the ground of undue influence, and was so to some extent by Lord Redesdale.

General words restrained by context.

Again, there is legal as well as equitable jurisdiction to restrain the effect of general words if it sufficiently appears by the context that they were not intended to convey their apparent unqualified meaning. It was held in *Browning v. Wright* (b) that a general covenant for title might be restrained by special covenants among which it occurred. And the same principle was again deliberately asserted shortly afterwards (in a case to the particular facts of which it was however held not to apply):—

"However general the words of a covenant may be if standing alone, yet if from other covenants in the same deed it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the Court will limit the operation of the general words" (c).

Similarly the effect of general words of conveyance is confined to property *eiusdem generis* with that which has been specifically described and conveyed (d). When there is a specific description of a particular kind of property, followed by words which *prima facie* would be sufficient to include other property of the same kind, it has been held that those words do not include the

(a) *Willan v. Willan*, 15 Ves. 6. 84; affirmed in Dom. Proc. 2 Dow 275, 278.

(b) 2 B. & P. 13, 26: but it was also thought the better construction to take the clause in question as being actually part of a special covenant, and so no general covenant at all.

(c) *Hesse v. Stevenson*, 3 B & P. 565, 574.

(d) *Rooke v. Lord Kensington*, 2 K. & J. 753, 771. The same principle applies to general words in the statement of a company's objects in its memorandum of association. *Ashbury, &c. Co. v. Riche*, L. R. 7 H. L. 653, *supra*, p. 92, &c.

property not specifically described, on the principle *expressio unius est exclusio alterius* (a).

Before we deal with the following heads it will be relevant to observe that the questions arising under them are for the most part either questions of evidence, or mixed questions of evidence and construction. This demands some preliminary explanation.

Observations on rules of evidence as connected with the following heads.

The end proposed is to give effect to the true intention of the parties concerned.

Intention has to be inferred from words, or conduct, or both.

In making these inferences conduct must generally be interpreted, and words may often be interpreted, by reference to other relevant circumstances of the transaction.

And the rules which guide a court of justice in determining of what things it may take notice for the purpose of such inferences, and in what manner such things may be brought to its notice—in other words, what facts are relevant, and what proof of such facts is required—are rules of evidence (b).

Evidence and construction.

A rule of construction is a rule for determining the inference to be drawn from a fact of a particular class when duly brought under the notice of the Court according to the rules of evidence—the fact, namely, that persons have used words or combinations of words such as come within the general proposition affirmed by the rule. The name “rule of construction” is confined by general usage to rules for the interpretation of written documents in matters on which, in the absence of a rule prescribed by authority, there might exist a reasonable doubt. Rules of con-

(a) *Denn v. Wilford*, 8 Dow. & Ry. 549. The case was a curious one. A fine had been levied of (inter alia) twelve messuages and twenty acres of land in Chelsea. The conusor had less than twenty acres of land in Chelsea, but nineteen messuages. It was decided that although all the messuages would have passed under the general description of land if no less number of messuages had been mentioned, yet the mention of twelve messuages prevented any greater number from passing under the description of land: and that parol evidence was

admissible to show first that there were in fact nineteen messuages, this being no more than was necessary to explain the nature and character of the property; next (as a consequence of the construction thereupon adopted by the Court) which twelve out of the nineteen messuages were intended. And see further the notes to *Roe v. Tranmarr*, 2 Sm. L. C. 519, 522.

(b) See the arrangement of the Indian Evidence Act, 1872. Part I. Relevancy of Facts. Part II. On Proof.

struction, therefore, are in practice closely connected with, and their importance is much affected by, rules of evidence (a).

We are now concerned with a general rule of evidence, and the modifications effected in some of its results partly by special rules of construction and partly by direct exceptions.

Meaning
of the rule
as to parol
evidence.

The principle from which the law sets out is one almost too obvious to need stating, being that on which we daily act in all the transactions of life: namely that men are to be taken to mean what they say.

The next step is of a somewhat more artificial character, but equally founded in reason. It is that men are taken to mean what they have chosen to say deliberately and in a permanent form rather than what they may have said in hasty or less considered discourse. Hence the general rule that evidence of an oral agreement is not admissible to contradict the terms of a written document. It has been thus stated: "The law prohibits generally, if not universally, the introduction of parol evidence to add to a written agreement, whether respecting or not respecting land, or to vary it" (b). "If A. and B. make a contract in writing, evidence is not admissible to show that A. meant something different from what is stated in the contract itself, and that B. at the time assented to it. If that sort of evidence were admitted every written document would be at the mercy of witnesses that might be called to swear anything" (c).

Rule of
equity.

In the absence of mistake or fraud, or a verbal agreement having been acted upon (d), the same rule prevails in equity, and this in actions for specific performance as well as in other proceedings, and whether the alleged variation is made by a

(a) Cp. Mr. F. V. Hawkins' remarks on rules of construction in the preface to his *Treatise on the Construction of Wills*.

(b) *Martin v. Pycroft*, 2 D. M. G. 785, 795. We have not to consider in this place how far those cases must be deemed really exceptional in which it is allowed to be shown that a custom of the country, or of trade, though not expressed, is in fact part of the contract.

(c) Per Pollock, C. B. *Nichol v. Godts*, 10 Ex. 191, 194, 23 L. J. Ex. 314. See also *Holton v. Browne*, 9 C. B. N. S. 442, 30 L. J. C. P. 106; *Halhead v. Young*, 6 E. & B. 312, 25 L. J. Q. B. 290.

(d) The doctrine of equity as to part performance rests on a principle analogous to estoppel (*Morphett v. Jones*, 1 Swanst. 172, 181) and does not belong to our present subject.

contemporaneous (a) or a subsequent (b) verbal agreement. "Variations verbally agreed upon . . . are not sufficient to prevent the execution of a written agreement, the situation of the parties in all other respects remaining unaltered" (c).

When a question arises as to the construction of a written instrument *as it stands*, parol evidence is no more admissible in equity than at law to show what was the intention of the parties. It is otherwise, as we shall presently see, where it is sought to *rectify* the instrument. And therefore the Court has in the same suit refused to look at the same evidence for the one purpose and taken it into account for the other (d).

It is no real exception to this rule that though "evidence to vary the terms of an agreement in writing is not admissible," yet "evidence to show that there is not an agreement at all is admissible," as where the operation of a writing as an agreement is conditional on the approval of a third person (e). "A written contract not under seal is not the contract itself, but only evidence—the record of the contract. When the parties have recorded their contract, the rule is that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, and so make the written document conclusive evidence between them. But it is always open to the parties to show whether or not the written document is the binding record of the contract" (f).

(a) *Omerod v. Hardman*, 5 Ves. 722, 730. Lord St. Leonards (V. & P. 163) says this cannot be deemed a general rule: but see *Hill v. Wilson*, 8 Ch. 888; per Mellish, L. J. at p. 899.

(b) *Price v. Dyer*, 17 Ves. 356; *Robinson v. Page*, 3 Russ. 114, 121. But a subsequent waiver by parol, if complete and unconditional, may be a good defence; *ib.*: *Goman v. Salisbury*, 1 Vern. 240. And *cp.* 6 Ves. 337 *a*, note. *Qu.* if not also at law, if the contract be not under seal: see Chitty on Contracts, 707 (8th ed.); Dart, V. & P. 970. Mr. Dart's statement seems too positive, for the case of *Noble v. Ward* (L. R. 2 Ex. 185) does not prove that "a verbal waiver of a written agreement is no defence at law" but only that a new verbal agreement intended to supersede an existing con-

tract, but by reason of the Statute of Frauds incapable of being enforced, cannot operate as a mere rescission of the former contract; the ground being that there is nothing to show any intention of the parties to rescind the first contract absolutely.

(c) *Price v. Dyer*, 17 Ves. at p. 364; *Clowes v. Higginson*, 1 Ves. & B. 524, where it was held (1) that evidence was not admissible to explain, contradict, or vary the written agreement, but (2) that the written agreement was too ambiguous to be enforced.

(d) *Bradford v. Romney*, 30 Beav. 431.

(e) *Pym v. Campbell*, 6 E. & B. 370, 374, 25 L. J. Q. B. 277.

(f) Per Bramwell, B. *Wake v. Harrop*, 6 H. & N. at p. 775, 30 L. J. Ex. at p. 277.

"The rules excluding parol evidence have no place in any inquiry in which the Court has not got before it some ascertained paper beyond question binding and of full effect" (a).

So in the late case of *Jervis v. Berridge* (b) it was held that a document purporting to be a written transfer of a contract for the purchase of lands "was . . . not a contract valid and operative between the parties but omitting (designedly or otherwise) some particular term which had been verbally agreed upon, but was a mere piece of machinery . . . subsidiary to and for the purposes of the verbal and only real agreement." And since the object of the suit was not to enforce the verbal agreement, nor "any hybrid agreement compounded of the written instrument and some terms omitted therefrom," but only to prevent the defendant from using the written document in a manner inconsistent with the real agreement, there was no difficulty raised by the Statute of Frauds, "which does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties." If it appears that a document signed by the parties, and apparently being the record of a contract, was not in fact intended to operate as a contract, then "whether the signature is or is not the result of a mistake is immaterial" (c).

Real exceptions in equity.

We shall see however that the heads now to be discussed present two classes of really exceptional cases recognized by equity.

Artificial rules of construction: origin assigned to them.

First, those in which equity applies to instruments of certain kinds rules of construction which (as regards the actual terms of the instruments) are highly artificial, so artificial, indeed, that they come to much the same thing as presuming a verbal agreement inconsistent with and operating to vary the written agreement.

(a) *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 115. And see per Page Wood, V.-C. in *Druiff v. Lord Parker*, 5 Eq. 131, 137.

(b) 8 Ch. 351, 359, 360.

(c) Per Bramwell, B. *Rogers v. Hadley*, 2 H. & C. 227, 249, 32 L. J.

Ex. 241. In this case there was "a real contract not in writing and a paper prepared in order to comply with some form, which was stated at the time to contain a merely nominal price."

The ground on which these rules were established (or at any rate which in modern times has been relied on to account for them) was that the manner in which the parties had expressed their intention did not correspond with their true intention. We must therefore consider the cases governed by the rules in question to have been originally cases of relief against mistaken expression. But since the doctrine of equity has been fixed and uniform they have practically ceased to have any such nature. For persons who make contracts are presumed to know the law of the land, including the law administered by courts of equity ; and therefore they must be presumed to know that if the nature of the contract and the terms used in framing it fall within the scope of these peculiar rules which have now become fixed rules of construction, the contract will be interpreted accordingly. And in fact they generally do know this, and use the accustomed expressions for the very reason that they have acquired a definite artificial meaning in courts of equity. It seems proper, on account of the origin of these equitable rules, to say something of them in this place, though not to go into details belonging to the fuller treatment of the special departments affected by them.

In the other class of exceptional cases, which form the last division of the subject, courts of equity have admitted oral evidence, for certain purposes and under certain limitations, to show that by reason of a mistake the terms of a written instrument fail to express the real intention of the parties, and that the real agreement is different from the written agreement. It will be obvious from the foregoing remarks that this class originally included the last.

Limited
admission
of oral
evidence
against
written
contract.

We proceed to consider the topics thus indicated.

2. *Peculiar rules of Construction in Equity.*

The material exceptions to the rule that contracts are construed alike at common law and in equity are—

- A. Restricted construction of general words, and especially of releases.
- B. Stipulations as to time.
- C. Penalties.

Restricted
construc-
tion of
general
words
carried
farther
than by
common
law: espe-
cially in
releases.

A. *Restriction of General Words.*

We have seen that courts of law as well as courts of equity have assumed a power to put a restricted construction on general words when it appears on the face of the instrument that it cannot have been the real intention of the parties that they should be taken in their apparent general sense.

But courts of equity will do the like if the same conviction can be arrived at by evidence external to the instrument. Thus general words of conveyance (*a*) and an unqualified covenant for title (*b*), though not accompanied as in *Browning v. Wright* (*c*) by other qualified covenants, have been restrained on proof that they were not meant to extend to the whole of their natural import.

This jurisdiction is exercised chiefly in dealing with releases. Here the principle is well established that "the general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given" (*d*). This includes the proposition that in equity "a release shall not be construed as applying to something of which the party executing it was ignorant" (*e*). There is at least much reason to think that it matters not whether such ignorance was caused by a mistake of fact or of law (*f*).

In particular a release executed on the footing of accounts rendered by the other party, and assuming that they are correctly rendered, may be set aside if those accounts are discovered to contain serious errors. It would be otherwise however if the party had examined the accounts himself and acted on his own judgment of their correctness. An important application of this

(*a*) *Thomas v. Davis*, 1 Dick. 301.

(*b*) *Coldcot v. Hill*, 1 Cha. Ca. 15, *sed qu.* for the case looks very like admitting contemporaneous conversation to vary the effect of a solemn instrument, and that without any mistake or fraud being made out, which is quite contrary to the modern rule.

(*c*) 2 B. & P. 13. *Supra*, p. 436.

(*d*) Per Lord Westbury, *L. & S. W. Ry. Co. v. Blackmore*, L. R. 4 H. L. at p. 623; cp. *Lindo v. Lindo*, 1 Beav. 496, 506; *Farewell v. Coker*,

cited 2 Mer. 353; Dav. Conv. 5. pt. 2. 622-4.

(*e*) Per Wilde, B. *Lyall v. Edwards*, 6 H. & N. 337, 348, 30 L. J. Ex. 193, 197. This was a case of equitable jurisdiction under the C. L. P. Act, 1854: but before that Act courts of law would not allow a release to be set up if clearly satisfied that a court of equity would set it aside: *Phillips v. Clagett*, 11 M. & W. 84.

(*f*) See the cases considered at pp. 396-7 above.

doctrine is in the settlement of partnership affairs between the representatives of a deceased partner (especially when they are continuing partners) and the persons beneficially interested in his estate (a).

A releasor, however, cannot obtain relief if he has in the meanwhile acted on the arrangement as it stands in such a way that the parties cannot be restored to their former position (b).

B. *Stipulations as to Time.*

It is a familiar principle that in all cases where it is sought to enforce contracts consisting of reciprocal promises, and "where the plaintiff himself is to do an act to entitle himself to the action, he must either show the act done, or if it be not done, at least that he has performed everything that was in his power to do" (c).

Stipulations as to time.

Accordingly, when by the terms of a contract one party is to do something at or before a specified time, and when he fails to do such thing within such time, he could not afterwards claim the performance of the contract if the stipulation as to time were construed according to its literal terms. Now "at law time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it. This is not the doctrine of a court of equity; and although the dictum of Lord Thurlow that time could not be made of the essence of a contract in equity (d) has long been exploded, yet time is held to be of the essence of the contract in equity, only in cases of direct stipulation or of necessary implication" (e).

A court of equity looks at the whole scope of the transaction to see whether the parties really meant the time named to be of the essence of the contract. And if it appears that, though they named a specific day for the act to be done, that which they

(a) *Millar v. Craig*, 6 Beav. 433; Lindley, 2. 981, and as to accounts stated, *ib.* 1026.

(b) *Skilbeck v. Hilton*, 2 Eq. 587, but *qu.* whether the principle was rightly applied in the particular case.

(c) Notes to *Peeters v. Opie*, 2 Wms. Saund. 743.

(d) *Seton v. Slade*, 7 Ves. 265, 275; and notes thereon in 2 Wh. & T. L. C.

(e) *Parkin v. Thorold*, 16 Beav. 59, 65.

really contemplated was only that it should be done within a reasonable time ; then this view will be acted upon, and a party who according to the letter of the contract is in default and incompetent to enforce it will yet be allowed to enforce it in accordance with what the Court considers its true meaning.

This is especially the case with regard to contracts between vendors and purchasers of land.

“ Courts of Equity have enforced contracts specifically, where no action for damages could be maintained ; for at law the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases was sufficient to require the interference of courts of equity. They dispense with that which would make compliance with what the law requires oppressive, and in various cases of such contracts they are in the constant habit of relieving the man who has acted fairly, though negligently. Thus in the case of an estate sold by auction, there is a condition to forfeit the deposit if the purchase be not completed within a certain time ; yet the Court is in the constant habit of relieving against the lapse of time : and so in the case of mortgages, and in many instances, relief is given against mere lapse of time where lapse of time is not essential to the substance of the contract.”

So said Lord Redesdale in a judgment which has taken a classical rank on this subject (a).

As to making time of the essence of the contract.

It was once even supposed that parties could not make time of the essence of the contract by express agreement ; but it is now perfectly settled that they can, the question being always what was their true intention (b), or rather “ what must be judicially assumed to have been their intention ” (c). “ If the parties choose even arbitrarily, provided both of them intend to do so, to stipulate for a particular thing to be done at a particular time,” such a stipulation is effectual in equity as well as at law. A court of equity will not interfere to make a new contract which the parties have not made (d). And although time is

(a) *Lennon v. Napper*, 2 Sch. & L. 684, cited by Knight Bruce, L. J. *Roberts v. Berry*, 3 D. M. G. at p. 289, and again adopted by the L. J.J. in *Tilley v. Thomas*, 3 Ch. 61.

(b) *Seton v. Slade*, 7 Ves. 265, 275, and notes to that case in 2 Wh. & T. L. C. ; *Parkin v. Thorold*,

supra.

(c) Grove, J. in *Patrick v. Milner*, 2 C. P. D. 342, 348.

(d) Per Alderson, B. *Hipwell v. Knight*, 1 Y. & C. (Ex.) 415. And see the observations of Kindersley V.-C. to the same effect in *Oakden v. Pike*, 34 L. J. Ch. 620,

not originally of the essence of the contract, yet subsequent "express notice will make time of the essence of the contract, where a reasonable time is specified" (a): as on the other hand conduct of the party entitled to insist on time as of the essence of the contract, such as continuing the negotiations without an express reservation after the time has past, may operate as an implied waiver of his right (b). The principles of Equity jurisprudence on this head are well embodied by the language of the Indian Contract Act, s. 55 :

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable, at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Indian
Contract
Act there-
on.

[The Court may infer from the nature of a contract, even though no time be specified for its completion, that time was intended to be of its essence to this extent, that the contracting party is bound to use the utmost diligence to perform his part of the contract] (c).

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time ; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If in case of a contract, voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor [*sic* in the Act, an obvious misprint for *promisor*] of his intention to do so (d).

C. Relief against Penalties.

In like manner penal provisions inserted in instruments to secure the payment of money or the performance of contracts will not be literally enforced, if the substantial performance of

Relief
against
penalties,
especially
as to mort-
gages.

(a) *Parkin v. Thorold*, 16 Beav. at p. 75 ; *Dart, V. & P.* 418-20 ; and see *Williams v. Glenton*, 1 Ch. 200, 210.

(b) *Webb v. Hughes*, 10 Eq. 281 : and see next note but one.

(c) *Macbryde v. Weekes*, 22 Beav. 533 (contract for a lease of working

mines).

(d) "It constantly happens that an objection is waived by the conduct of the parties," per James, L. *J. Upperton v. Nickolson*, 6 Ch. at p. 443. And see *Dart, V. & P.* 424.

that which was really contemplated can be otherwise secured (*a*). The most important application of this principle is in the jurisdiction of equity concerning mortgages. A court of equity treats the contract as being in substance a security for the repayment of money advanced, and that portion of it which gives the estate to the mortgagee as mere form, "and accordingly, in direct violation of the [form of the] contract," it compels the mortgagee to reconvey on being repaid his principal, interest, and costs (*b*). Here again the original ground on which equity interfered was to carry out the true intention of the parties. But it cannot be said here, as in the case of other stipulations as to time, that everything depends on the intention. For the general rule "once a mortgage, and always a mortgage" cannot be superseded by any express agreement so as to make a mortgage absolutely irredeemable (*c*). However limited restrictions on the mutual remedies of the mortgagor and mortgagee, as by making the mortgage for a term certain, are allowed and are not uncommon in practice. Also there may be such a thing as an absolute sale with an option of repurchase on certain conditions; and if such is really the nature of the transaction, equity will give no relief against the necessity of observing those conditions (*d*).

"That this Court will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appears that the parties intended it to be a mortgage, is no doubt true" (*e*). Indeed, a court of law as well as a court of equity will look into the true character of a transaction purporting to be an absolute sale, and see whether a mortgage or an absolute sale was intended (*f*). "But it is equally clear, that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase, not acted upon, will not of itself entitle the vendor to redeem" (*g*).

(*a*) In addition to the authorities cited below see the later case of *Ex parte Hulse*, 8 Ch. 1022.

(*b*) Per Romilly, M. R. *Parkin v. Thorold*, 16 Beav. 59, 68; and see Lord Redesdale's judgment in *Lennon v. Napper*, *supra*.

(*c*) *Howard v. Harris*, 1 Vern. 190; *Cowdry v. Day*, 1 Giff. 316, see reporter's note at p. 323; 1 Ch. Ca. 141.

(*d*) *Davis v. Thomas*, 1 Russ. & M. 506.

(*e*) See *Douglas v. Culverwell*, 31 L. J. Ch. 543.

(*f*) *Gardner v. Cazenove*, 1 H. & N. 423, 435, 438, 26 L. J. Ex. 17, 19, 20.

(*g*) Per Lord Cottenham, C. *Williams v. Owen*, 5 M. & Cr. 303, 306.

The manner in which equity deals with mortgage transactions is but one consequence of a more general proposition, which is this : that General rule.

“Where there is a debt actually due, and in respect of that debt a security is given, be it by way of mortgage or be it by way of stipulation that in case of its not being paid at the time appointed a larger sum shall become payable, and be paid, in either of those cases Equity regards the security that has been given as a mere pledge for the debt, and it will not allow either a forfeiture of the property pledged, or any augmentation of the debt as a penal provision, on the ground that Equity regards the contemplated forfeiture which might take place at law with reference to the estate as in the nature of a penal provision, against which Equity will relieve when the object in view, namely, the securing of the debt, is attained, and regarding also the stipulation for the payment of a larger sum of money, if the sum be not paid at the time it is due, as a penalty and a forfeiture against which Equity will relieve” (a).

This applies not only to securities for the payment of money but to all cases “where a penalty is inserted merely to secure the enjoyment of a collateral object” (b). In all such cases the penal sum was originally recoverable in full in a court of law, but actions brought to recover penalties stipulated for by bonds or other agreements have for a long time been governed by statutes (c). And a mortgagee suing at law in ejectment, or on a bond given as collateral security (d), may be compelled by rule of Court to reconvey on payment of principal, interest, and costs (e).

It would lead us too far beyond our present object to discuss the cases in which the question, often a very nice one, has arisen, whether a sum agreed to be paid upon a breach of contract is a penalty or liquidated damages. It may be noted however in passing that “the words *liquidated damages* or *penalty* are not conclusive as to the character of the sum stipulated to be

(a) Per Lord Hatherley, C. *Thompson v. Hudson*, L. R. 4 H. L. 1, 15,

(b) Per Lord Thurlow, *Sloman v. Walter*, 2 Wh. & T. L. C. 1094.

(c) As to common money bonds : 4 & 5 Anne, c. 16, s. 13 ; C. L. P. Act 1860 (23 & 24 Vict. c. 126), s. 25. As to other bonds and agree-

ments : 8 & 9 Wm. 3, c. 11, s. 8. The statutes are collected and reviewed in the late case of *Preston v. Dania*, L. R. 8 Ex. 19.

(d) This is now very infrequent in practice.

(e) 7 Geo. 2, c. 20 ; C. L. P. Act 1852 (15 & 16 Vict. c. 76) s. 219.

paid," which must be determined from the matter of the agreement (a).

3. *Peculiar Defences and Remedies derived from Equity.*

Defence
against
specific
perform-
ance.

A. *Defence against Specific Performance.*

When by reason of a mistake (*e.g.* omitting some terms which were part of the intended agreement) a contract in writing fails to express the real meaning of the parties, the party interested in having the real and original agreement adhered to (*e.g.* the one for whose benefit the omitted term was) is in the following position.

If the other party sues him in equity for the specific performance of the contract as expressed in writing, it will be a good defence if he can show that the written contract does not represent the real agreement: and this whether the contract is of a kind required by law to be in writing or not. Thus specific performance has been refused where a clause had been introduced by inadvertence into the contract (b). It is sometimes said with reference to cases of this class that the remedy of specific performance is discretionary. But this means a judicial and regular, not an arbitrary discretion. The Court "must be satisfied that the agreement would not have been entered into if its true effect had been understood" (b).

Town-
shend v.
Stan-
groom.

On the other hand a party cannot, at all events where the contract is required by law to be in writing, come forward as plaintiff to claim the performance of the real agreement which is not completely expressed by the written contract. Thus in the case of *Townshend v. Stangroom* (c) (referred to by Lord Hatherley when V.-C. as perhaps the best illustration of the principle) (d) there were cross suits (e), one for the specific performance of a written agreement as varied by an oral agree-

(a) Per Bramwell, *B. Betts v. Burch*, 4 H. & N. 506, 511, 28 L. J. Ex. 267, 271; Leake on Contracts, 573, 578. The latest cases on this subject in Common Law and Equity respectively are—*Lea v. Whitaker*, L. R. 8 C. P. 78, *Magee v. Lavell*, 9 C. P. 107; *Ex parte D'Alteyrac*, 15 Eq. 36, *Ex parte Capper*, 4 Ch. D. 724. In the Indian Contract

Act the knot is cut by abolishing the distinction altogether: see s. 74.

(b) *Watson v. Marston*, 4 D. M. G. 230, 240.

(c) 6 Ves. 328.

(d) *Wood v. Scarth*, 2 K. & J. 33, 42.

(e) Under the Judicature Acts there would be an action and counter-claim.

ment, the other for specific performance of the written agreement without variation: and the fact of the parol variations from the written agreement being established, both suits were dismissed. And the result of a plaintiff attempting to enforce an agreement with alleged parol variations, if the defendant disproves the variations and chooses to abide by the written agreement, may be a decree for the specific performance of the agreement as it stands at the plaintiff's cost (a).

But it is open to a plaintiff to admit a parol addition or variation made for the defendant's benefit, and so enforce specific performance which the defendant might have successfully resisted if it had been sought to enforce the written agreement simply. This was settled in *Martin v. Pycroft* (b): "The decision of the Court of Appeal proceeded on the ground that an agreement by parol to pay 200*l.* as a premium for . . . a lease [for which there was a complete agreement in writing not mentioning the premium] was no ground for refusing specific performance of the written agreement for the lease, where the plaintiff submitted by his bill to pay the 200*l.* That case introduced no new principle as to the admissibility of parol evidence" (c).

It is to be observed (though the observation is now familiar) that these doctrines are in principle independent of the Statute of Frauds (d). What the fourth section of the Statute of Frauds says is that in respect of the matters comprised in it no agreement not in writing and duly signed shall be sued upon. This in no way prevents either party from showing that the writing on which

Relation
of this
doctrine
to Statute
of Frauds.

(a) See *Higginson v. Cloves*, 15 Ves. 516, 525; and such, it is submitted, is the real effect of *Fife v. Clayton*, 13 Ves. 546, s. c. more fully given 1 C. P. Cooper (temp. Cottenham) 351: the different statement in *Dart, V. & P.* 1116, appears on examination to be hardly borne out by either report, and is at all events not consistent with *Townshend v. Stangroom*, or with the general doctrine of the Court. In this case Lord Eldon laid hold on the plaintiff's attempt to set up a variation, combined with an offer in general terms to perform the agreement, as amounting to an offer to perform whatever the Court might consider the real agreement, perhaps even if

established by evidence which would otherwise have been admissible only by way of defence. But after a plaintiff has failed to support his own construction of an agreement which the Court thinks ambiguous, he cannot take advantage of such an offer contained in his own pleadings "to take up the other construction which the defendant was at one time willing to have performed:" *Cloves v. Higginson*, 1 Ves. & B. 524, 535.

(b) 2 D. M. G. 785.

(c) Per Stuart, V.-C. *Price v. Ley*, 4 Giff. at p. 253.

(d) See per Lord Redesdale, in *Clinan v. Cooke*, 1 Sch. & L. 33-39.

the other insists does not represent the real agreement; it is only when the real agreement cannot be positively established by a writing which satisfies the requirements of the statute that the statute interferes. Then there is nothing which can be enforced at all. The writing cannot, because it is not the real agreement; nor yet the real agreement, because it is not in writing.

A good instance of this state of things is *Price v. Ley* (a). The suit was brought mainly to set aside the written agreement, and so far succeeded. It appears not to have been seriously attempted to insist upon the real agreement which had not been put into writing.

B. *Rectification of Instruments.*

When the parties to an agreement have determined to embody their common intention in the appropriate and conclusive form, and the instrument meant to effect this purpose is by mistake so framed as not to express the real intention which it ought to have expressed, it is possible in many cases to correct the mistake by means of a jurisdiction formerly peculiar to courts of equity, and still reserved, as a matter of procedure, to the Chancery Division.

Courts of equity "assume a jurisdiction to reform instruments which, either by the fraud or mistake of the drawer, admit of a construction inconsistent with the true agreement of the parties. And of necessity, in the exercise of this jurisdiction, a court of equity receives evidence of the true agreement in contradiction of the written instrument." Relief will not be refused though the party seeking relief himself drew the instrument; for "every party who comes to be relieved against an agreement which he has signed, by whomsoever drawn, comes to be relieved against his own mistake" (b). The jurisdiction is a substantive and independent one, so that it does not matter whether the party seeking relief would or would not be able to get the benefit of the true intention of the contract by any other form of remedy (c). It would be neither practicable nor desirable to discuss minutely the very numerous cases in which this jurisdiction has been exemplified. The most important thing to be known about a

(a) 4 Giff. 235, affirmed on appeal, 210, 219.

32 L. J. Ch. 534.

(b) *Ball v. Storie*, 1 Sim. & St. 131.

(c) *Druiff v. Lord Parker*, 5 Eq.

discretionary power of this kind is whether there is any settled rule by which its exercise is limited. In this case there are ample authorities to show that there is such a rule, and they expound it so fully, that there is very little left to be added by way of comment.

The manner in which the Court proceeds is put in a very clear light by the opening of Lord Romilly's judgment in the case of *Murray v. Parker* (a):—

Principles on which courts of equity will rectify instruments.

"In matters of mistake, the Court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still it is to be exercised in all cases where a deed, as executed, is not according to the real agreement between the parties. In all cases the real agreement must be established by evidence, whether parol or written; if there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly; if ambiguous parol evidence may be used to explain it, in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument."

In the case of "a previous agreement in writing which is unambiguous" the Court cannot admit parol evidence to rectify the final instrument executed in accordance with such agreement any more than it could allow the party to maintain a suit, while the agreement was yet executory, first to rectify the agreement by parol evidence and then execute it as rectified—which, as we have seen, it will not do. For this would be to "reform [the instrument] by that evidence, which if [the instrument] rested *in fieri*, would be inadmissible to aid in carrying it into execution" (b).

Previous agreement in writing not allowed to be varied.

This language, it will be seen, is not in terms confined to cases within the Statute of Frauds. But it might perhaps well be argued, should the occasion for it ever arise, that no other cases were in fact contemplated by Lord St. Leonards in giving the judgment now cited.

But what if there be no previous agreement in writing at all? Can a deed be rectified on oral evidence of what was the real intention of the parties at the time, in the absence of any better?

Oral evidence of the real agreement, how

(a) 19 Beav. 305, 308.

(b) Per Lord St. Leonards, *Davies*

v. Pitton, 2 Dr. & War. 225, 233.

far admis-
sible in the
absence of
any other.

We cannot find that any positive and direct answer has been given to this question. An old unreported case has been preserved as cited in argument which, if the statement of it could be relied on, would indeed be a clear authority for the negative (a). However the modern decisions do not seem to go beyond requiring the best evidence that can be had in each particular case.

Lord St. Leonards said in *Alexander v. Crosbie* (b) :

"In all the cases, perhaps, in which the Court has reformed a settlement, there has been something beyond the parol evidence, such for instance as the instructions for preparing the conveyance or a note by the attorney, and the mistake properly accounted for ; but the Court would, I think, act where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach."

This opinion was approved by Stuart, V.-C., in *Moss v. Harter* (c).

And again in *Mortimer v. Shortall* (d) : "There is no objection to correct a deed by parol evidence, when you have anything beyond the parol evidence to go by. But where there is nothing but the recollection of witnesses, *and the defendant by his answer denies the case set up by the plaintiff*, the plaintiff appears to be without a remedy. Here I am not acting upon parol evidence alone ; the documents in the cause, and the subsequent transactions, corroborate the parol evidence, and leave no doubt in my mind as to a mistake having been made." As Lord St. Leonards expressly professed in this case to adhere to what he said in *Alexander v. Crosbie*, we must infer that a mistake which is positively denied by one party cannot be ever considered as "clearly established" on parol evidence.

Again, it was said in a case on the equity side of the Court of Exchequer where the whole subject was considerably discussed :

"It seems that the Court ought not in any case, *where the mistake is denied or not admitted by the answer*, to admit parol evidence, and upon that evidence to reform an executory agreement" (e).

(a) *Hardwood v. Wallace*, 2 Ves. Sr. 195.

(b) Ll. & G. temp. Sugden, 145, 150. Cp. *Davies v. Fitton*, 2 Dr. & War. 283.

(c) 18 Jur. 973, 976.

(d) 2 Dr. & War. 363, 374.

(e) Per Alderson, B. *Atty.-Genl. v. Sitwell*, 1 Y. & C. Ex. 559, 583.

On the other hand, when the mistake is admitted, or not positively denied, there seems to be no difficulty in reforming a written instrument on parol evidence alone (a).

The result seems to be that in the absence of any evidence in writing of the real previous agreement, oral evidence of it, *if not contradicted*, may be admitted. Is admitted if not contradicted.

Thus far as to the nature of the evidence required; next let us see what it must prove. It is indispensable that the evidence should amount to "proof of a mistake common to all the parties" (b) *i.e.* a common intention different from the expressed intention and a common mistaken supposition that it is rightly expressed: it matters not, as we have seen, by whom the actual oversight or error is made which causes the expression to be wrong. The leading principle of equity on the head of rectification, *viz.* that there must be clear proof of a real agreement of both parties different from the expressed agreement, and that a different intention or mistake of one party alone is no ground to vary the agreement expressed in writing, was distinctly laid down by Lord Hardwicke as long ago as 1749 (c). What must be proved: common intention of parties different from expressed intention.

The same thing was very explicitly asserted in *Fowler v. Fowler* (d):

"The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake, is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be

(a) *Townshend v. Stangroom*, 6 Ves. 328, 334; *Ball v. Storie*, 1 Sim. & St. 210; *Druiff v. Lord Parker*, 5 Eq. 131; *Ex parte National Provincial Bank of England*, 4 Ch D. 241.

(b) Per Lord Romilly, *M. R. Bentley v. Mackay*, 31 Beav. at p. 151.

(c) *Henkle v. Royal Exch. Asse. Co.* 1 Ves. Sr. 318.

(d) 4 De G. & J. 250, 264.

brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of a mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement" (a).

Proof of
one party's
intention
will not do.

So it has been laid down by the American Supreme Court that Equity may compel parties to perform their agreement, but has no power to make agreements for parties and then compel them to execute the same (b); to the same effect in *Rooke v. Lord Kensington* (c) by Lord Hatherley when V.-C.; and more recently by James, L. J. when V.-C., in *Mackenzie v. Coulson* (d). On this principle, as we have already seen, the jurisdiction to rectify instruments does not extend beyond particular expressions. The Court cannot alter that form of instrument which the parties have deliberately chosen (b).

The Court therefore cannot act on proof of what was intended by one party only (e). And when an instrument contains a variety of provisions, and some of the clauses may have been passed over without attention, "the single fact of there being no discussion on a particular point will not justify the Court in saying that a mistake committed on one side must be taken to be mutual" (f). The Court will not rectify an instrument when the result of doing so would be to affect interests already acquired by third parties on the faith of the instrument as it stood (g).

Without derogation from the above general rules, a contract of insurance is liberally construed for the purpose of reforming the policy founded upon it in accordance with the true intention (h).

Possible
exception
where one
party acts
as other's
agent.

There exists a rare class of cases (we know of only one complete instance at present) in which the rule that a common mistake must be shown may admit of modification. This is where one party acts as another's agent in preparing an instrument which concerns them both—in the particular case an intended

(a) Pp. 264-5.

(b) *Hunt v. Rousmaniere's Adm.*
1 Peters 14, p. 395 above.

(c) 2 K. & J. 753, 764.

(d) 8 Eq. 368, 375.

(e) *Hills v. Rowland*, 4 D. M. G.
430, 436.

(f) *Thompson v. Whitmore*, 1 J.
& H. 268, 276.

(g) *Blackie v. Clark*, 15 Beav.
595.

(h) *Equitable Insurance Company
v. Hearne*, 20 Wallace (Sup. Ct. U.
S.) 494.

husband had the marriage settlement prepared in great haste and without any advice being taken on the wife's part)—and that other gives no definite instructions, but relies on the good faith and competence of the acting party to carry out the true intention. Here the acting party takes on himself the duty of framing a proper instrument—such an instrument, in fact, as would be sanctioned by the Court if the Court had to execute the agreement. And the instrument actually prepared, and executed by the other party on the assumption that it is properly framed, may be corrected accordingly (a).

But cases of this kind would perhaps be better put on the ground that the acting party is estopped by his conduct from denying that the intention of the other party was in fact the common intention of both. Compare p. 430 above.

The most frequent application of the jurisdiction of equity to rectify instruments is in the case of marriage and other family settlements (b), when there is a discrepancy between the preliminary memorandum or articles and the settlement as finally executed. As to marriage settlements, the distinction was formerly held that if both the articles and the settlement were ante-nuptial, the settlement should be taken in case of variance as a new agreement superseding the articles, unless expressly mentioned to be made in pursuance of the articles; but that a post-nuptial settlement would always be reformed in accordance with ante-nuptial articles. The modern doctrine of the Court has modified this as follows, so far as regards settlements executed after preliminary articles but before the marriage :

1. When the settlement purports to be in pursuance of articles previously entered into, and there is any variance, the variance will be presumed to have arisen from mistake. Reformation of settlements according to previous articles.

2. When the settlement does not refer to the articles, it will not be presumed, but it may be proved, that the settlement was meant to be in conformity with the articles, and that any variance arose from a mistake.

(a) *Clark v. Girdwood*, 7 Ch. D. 9, on the authority of *Corley v. Lord Stafford*, 1 De G. & J. 238, where

however there was no rectification.

(b) See further on this subject *Dav. Conv.* 3, pt. 1. Appx. No. 3.

In the first case the Court will act on the presumption, in the second on clear and satisfactory evidence of the mistake (*a*).

A settlement may be rectified even against previous articles on the settlor's uncontradicted evidence of departure from the real intention (*b*).

The fact that a provision inserted in a settlement (*e.g.* restraint on anticipation of the income of the wife's property) is in itself usual and is generally considered proper, is not a ground for the Court refusing to strike it out when its insertion is shown to have been contrary to the desire of the parties and to the instructions given by them (*c*). There is however a general presumption, in the absence of distinct or complete evidence of actual intention, that the parties intend a settlement to contain dispositions and provisions of the kind usual under the circumstances : see pp. 434-5 above.

At whose
suit rectifi-
cation may
be had.

It is not necessary that a person claiming to have a settlement rectified should be or represent a party to the original contract, or be within the consideration of it (*d*). But a deed which is wholly voluntary in its inception cannot be reformed if the grantor contests it, but must stand or fall in its original condition without alteration (*e*); the reason of this has been explained to be that an agreement between parties for the due execution of a voluntary deed is not a contract which the Court can interfere to enforce (*f*).

But the Court has power to set aside a voluntary deed in part only at the suit of the grantor if he is content that the rest should stand (*g*).

Option to
rectify or
set aside
in certain

Some cases of a rather peculiar kind which have already been touched upon under another heading (*h*) must here be mentioned as in apparent conflict with one of the rules above stated.

(*a*) *Bold v. Hutchinson*, 5 D. M. G. 558, 567, 568. In reforming a settlement the intent rather than the literal words of the articles will be followed : for a late instance see *Cogan v. Duffield*, (C.A.) 2 Ch. D. 44. As to the general principles on which courts of equity construe instruments creating executory trusts, see *Sackville-West v. Viscount Holmesdale*, L. R. 4 H. L. 543, 555, 565.

(*b*) *Smith v. Iliffe*, 20 Eq. 666.

(*c*) *Torre v. Torre*, 1 Sm. & G. 518.

(*d*) *Thompson v. Whitmore*, 1 J. & H. 268, 273.

(*e*) *Broun v. Kennedy*, 33 Beav. at p. 147.

(*f*) *Lister v. Hodgson*, 4 Eq. at p. 34.

(*g*) *Turner v. Collins*, 7 Ch. 329, 342; and see per Turner, L. J. *Bentley v. Mackay*, 4 D. F. J. 286.

(*h*) *Supra*. p. 416.

In these instances the plaintiff sought to reform an instrument, and satisfied the Court that it did not represent what was his own intention at the time of execution, but failed to establish that the other party's intention was the same ; and since it was "in the power of the Court to put the parties in the same position as if the contract had not been executed," an option was given to the defendant of "having the whole contract annulled, or else of taking it in the form which the plaintiff intended" (a). This is hardly an exception to the rule that the Court does not interfere to rectify a mistake unless it is shown to have been common to both parties ; for here the rectification is only an alternative proposal. The Court says to the defendant in effect : Either the agreement between you was such as the plaintiff says it was, or there was no real agreement at all. Take which of these two views you please, but it is certain that the terms you have contended for were never agreed to by the plaintiff, and by them at all events he is not to be bound.

When a conveyance is rectified the order of the Court is sufficient without a new deed. A copy of the order is indorsed on the deed which is to be rectified (b). New deed
not re-
quired.

APPENDIX E. (See p. 408, above.)

Mr. Benjamin's remarks on *Boulton v. Jones* (Benjamin on Sale, 47, 324) deserve much consideration. He appears to think that the actual existence of a set-off in favour of the defendants against Brocklehurst, to whom the order was addressed, was necessary to the decision. And in the report which he follows (27 L. J. Ex. 117) the fact that such a set-off existed does certainly come into much more prominence than in the case as reported in H. & N. One cannot differ without hesitation from so learned and accurate a writer as Mr. Benjamin ; but it is submitted that according to his view the plaintiff's claim should have failed not wholly, but only so far as the defendants were prejudiced by his substitution for the person with whom they intended to contract : that is, there should have been a good cause of action for the excess (if any) of the price of the goods over

(a) *Harris v. Pepperell*, 5 Eq. 1, 427.
5 ; *Garrard v. Frankel*, 30 Beav. 445 ; *Bloomer v. Spittle*, 13 Eq. (b) *White v. White*, 15 Eq. 247.

the set-off; this being the amount which the defendants in fact intended to pay. The defendants would then have been in the same position as if they had been dealing with an agent for an undisclosed principal. But this analogy was expressly held to be inapplicable: and it seems to us that the decision rests on the broad ground that independently of any question of set-off, there was no contract: not an express one, for the defendants' order was not addressed to the plaintiff; not an implied one, for the defendants accepted and kept the goods without knowing that they were the plaintiff's.

Mr. Benjamin further suggests that the plaintiff cannot be supposed to have been wholly without remedy and that he might in some way have obtained relief against the defendants in equity. It is difficult however to see how the defendants could be liable in equity any more than at law otherwise than on a contract express or implied. A constructive trust for the plaintiff of the set-off against Brocklehurst would only be another form of implied contract. The plaintiff's proper remedy would have been to sue in the name of Brocklehurst, and possibly Brocklehurst would have been bound in equity to allow his name to be used. But this would depend on the terms on which his business was made over to the plaintiff, and to do complete justice in the matter it would have been necessary to know those terms. What was really wanted was the power to add Brocklehurst as a party to the cause, which could not be done at common law. The Court is now able to provide for such cases. See the Judicature Act, 1873, s. 24, sub-s. 1, and the Rules of the Supreme Court, Order XIV, rr. 3, 4, 6, 13.

APPENDIX F.

Bracton
on funda-
mental
error.

It may be not without interest to observe that Bracton in his chapter *De acquirendo rerum dominio*, fo. 16, treats the subject of fundamental error very much as it is treated in our modern law. "Item non valet donatio, nisi tam dantis quam accipientis concurrat mutuus consensus et voluntas, seu quod donator habeat animum donandi et donatorius animum recipiendi Item oportet quod non sit error in re data, quia si donator senserit de una re et donatorius de alia, non valet donatio propter dissensum: et idem erit si dissentio fiat in genere, numero, et quantitate [Then follow instances.] Et in fine notandum quod si in corpus quod traditur sit consensus, non nocet, quamvis circa causam dandi atque recipiendi sit dissentio: ut si pecuniam numeratam tibi tradam, vel quid tale, et tu eam quasi traditam accipias, constat, ad te proprietatem transire." This last instance is almost in the words of the

Digest, 41. 1. de acq. rer. dom. 36, from which we should probably write *creditam* for *traditam* in Bracton's text. Güterbock (Henricus de Bracton, p. 85) assumes somewhat hastily that Bracton misunderstood the passage. With *Thoroughgood's* case (p. 401 *supra*) and other authorities of that class we may also compare what Fleta has upon the possible defences to an action on a deed (lib. 6. c. 33 § 2). "Si autem vocatus dicat quod carta sibi nocere non debeat . . . vel quia per dolum advenit, ut si cartam de feoffamento sigillatam [*sic*: one or more words seem to have dropped out] cum scriptum de termino annorum sigillare crediderit, vel ut si carta fieri debuit ad vitam, illam fecit fieri in feodo et hujusmodi, dum tamen nihil sit quod imperitiae vel negligentiae suae possit imputari ut [*qu.* ut si] sigillum suum Senescallo tradiderit vel uxori quod cautius debuit custodivisse."

APPENDIX G.

It seems convenient to note, though it is not strictly within the scope of the present undertaking, that there is no jurisdiction in any court to rectify a will on the ground of mistake. The Court of Probate may reject words of which the testator is proved to have been ignorant, whether inserted by the fraud or by the mistake of the person who prepared the will. But it has no power to remedy a mistake "by modifying the language used by the draftsman and adopted by the testator so as to make it express the supposed intention of the testator. . . . Such a mode of dealing with wills would lead to the most dangerous consequences, for it would convert the Court of Probate into a court of construction of a very peculiar kind, whose duty it would be to shape the will into conformity with the supposed intentions of the testator" (a). Exactly the same rule has been laid down in equity (b).

No jurisdiction to rectify a will.

The cases in which it is said that the Court will interfere to correct mistakes in wills may be classified thus:

1. Cases purely of construction according to the general intention collected from the will itself (c).

2. Cases of equivocal description, of words used in a special habitual sense (c), or of a wrongly given name which may be corrected by a sufficient description (d).

(a) *Harter v. Harter*, L. R. 3 P. & D. 11, 21, following *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109.

(b) *Newburgh v. Newburgh*, 5 Madd. 364.

(c) See Hawkins on Construction of Wills, Introduction.

(d) Not only an equivocal name may be explained, but a name which applies to only one person may be corrected by a description sufficiently showing that another person is intended: *Charter v. Charter*, L. R. 7 H. L. 364.

3. Cases of dispositions made on what is called a *false cause* (a), i.e. on the mistaken assumption of a particular state of facts existing, except on which assumption the disposition would not have been made. These are analogous to the cases of contract governed by *Couturier v. Hastie* (b): and just as in those cases, the expressed intention is treated as having been dependent on a condition which has failed.

But it seems more proper to say in all these cases, not that the words are corrected, but that the intention when clearly ascertained is carried out notwithstanding the apparent difficulty caused by the particular words.

(a) *Campbell v. French*, 3 Ves.
321.

(b) 5 H. L. C. 673. *Supra*, p.
425.

CHAPTER IX.

MISREPRESENTATION AND FRAUD.

PART 1.—MISREPRESENTATION.

THE consent of one party to a contract may be caused by a Misrepresentation made by the other of some matter, such that, if he had known the truth concerning it, he would not have entered into the contract. Putting off for a while the closer definition of the term, we see at once that there is a broad distinction between fraudulent and non-fraudulent misrepresentation. A statement may be made with knowledge of its falsehood and intent to mislead the other party, or with reckless ignorance as to its truth or falsehood. In either of these cases the making of it is wrongful in a moral and also in a legal sense, and the conduct of the party making it is called Fraud. There has never been any substantial difficulty as to the treatment of such conduct in English courts of justice. On the other hand a statement which in fact is not true and misleads the other party may be made by mere carelessness or misadventure, or with an actual belief in its truth, which belief may or may not be reasonably entertained. The treatment of cases of this kind is far more difficult. In our common law it is pretty well defined, but inadequate; in equity it is adequate, or rapidly becoming so, but not exactly defined, and the only safe way to arrive at any probable conclusion is still to trace out the doctrines of common law and equity separately. Complication and confusion have arisen from more than one source. The most fruitful of these has been the unfortunate use of the term Fraud in the Court of Chancery as *nomen generalissimum* (a).

(a) See 8 Ch. 124.

The probable historical explanation is that in earlier times this was the only means of extending and completing a beneficial jurisdiction; but such a habit of speech is in itself open to grave objection on practical as well as scientific grounds (*a*). It has given us such phrases as "constructive fraud," conduct "amounting to fraud in the contemplation of a Court of Equity," and the like descriptions, under which it is possible to bring almost anything (*b*). In courts of law too some difficulty has been caused by the indefinite use of the term Fraud, but more particularly by the assumption that the right of rescinding a contract on the ground of a false representation must needs be strictly co-extensive with the right of bringing a distinct action of deceit, in which the representation is treated as a substantive wrong.

Again, there is this unavoidable confusion in practice, at any rate in equity, that the question of innocent misrepresentation is seldom or never raised as a neat point. The cases are almost invariably mixed up with charges of actual fraud, of which it is sometimes not easy to ascertain the precise effect.

It will be understood therefore that we approach the subject with considerable diffidence. We will first endeavour to deal with the more troublesome part of it, namely *non-fraudulent* representations.

General
doctrine as
to repre-
sentations
at common
law.

"A representation is a statement or assertion made by the one party to the other, before or at the time of the contract, of some matter or circumstance relating to it" (*c*). The judgment of the Exchequer Chamber from which we take this definition goes on to state that, apart from fraud, which must be separately considered, and apart from certain exceptional classes of contracts, the validity of a contract is not affected if a representation so made is found to be untrue (much less if there is a mere omission to state a material fact), nor is such untruth or omission any cause of action (that is, of a separate independent action in tort).

(*a*) The ambiguous use of the word leads on the one hand, to unfounded charges of fraud in the strict sense, and on the other hand to the absence of fraud in that sense being set up in answer to a case which is really of a quite different kind.

(*b*) See the wonderfully miscellaneous contents of the chapters on "Actual Fraud" and "Constructive Fraud" in Story's Eq. Jurisp.

(*c*) Per Cur. *Behn v. Burness* (Ex. Ch.) 3 B. & S. 751, 32 L. J. Q. B. 204.

A representation, however, may be made an essential part of the contract, so that the contract is conditional upon its truth. It is then said to be a *condition* (a).

Or there may be a distinct collateral agreement that the representation shall be true, so that its untruth, if so it prove, does not avoid the contract, but is a matter for compensation. It is then said to be a *warranty*.

The classes of contracts which are exceptionally treated are these :

- (A) Marine insurance.
- (B) Fire insurance.
- (C) Suretyship.
- (D) Sales of land.
- (E) (In equity) Family settlements.

The peculiarity common to most of them, on which the exception is founded, is that the subject-matter of the contract is especially within the knowledge of one party, and the other has to rely, in the first instance at all events, on the correctness of the statements made by him. The same reason applies, and has been applied by recent decisions to

(F) Contracts to take shares in companies and contracts of promoters (b).

So far, then, the rule is certain both as regards cases where there is a condition or warranty, and as regards the excepted classes of contracts. The question remains, however, whether equity jurisprudence does not furnish us with a wider general rule.

Certainly it would be possible to express it in a similar form by enlarging the number of excepted cases : and it so far agrees with the common law that mere non-disclosure of material facts is *prima facie* no ground for rescinding a contract. But the prevailing tendency of authorities, and a certain amount of definite

(a) Or "warranty in the nature of a condition," see per Channell, B. 8 E. & B. 302. But the use of the word *warranty* alone in this sense, though to some extent sanctioned by the Court, has been elsewhere deprecated by considerable authorities, and is clearly undesirable.

(b) It is not easy to say whether this last extension would have been

adopted by courts of common law before the Judicature Acts. *Kennedy v. Panama, &c. Mail Co.* L. R. 2 Q. B. 580, p. 413 above, seems against it, but the question was not fairly raised. It is now of no practical importance : the affirmative is assumed in the text for simplicity's sake.

authority (though less than one might expect) are for putting the rule the other way : and on the whole the rule of equity, which is now the general rule of the Court, may be considered to stand thus :—

Doctrine
of equity.

A contract is voidable at the option of a party who has been induced to enter into it by a statement contrary to the fact made by the other party without reasonable grounds for believing it, though he does in fact believe it ;

or by the other's silence as to a material fact which, having regard to the nature of the contract or the position of the parties, it is his duty to communicate :

Such statement or omission as aforesaid is called a misrepresentation.

A contract is not voidable on the ground of misrepresentation, if the party seeking to set it aside has made independent inquiries in the matter of the representation and acted on his own judgment ;

or, where the misrepresentation consists in silence, if he had the means of discovering the truth with ordinary diligence.

Such are believed to be the doctrines of common law and equity in their general outline. We proceed to follow them out in the order above given, beginning with the special topics for which special rules are clearly established. After this we shall be in a better position to judge how far any of these special rules are really treated as general rules in equity.

Representations amounting to Warranty or Condition.

Cases
specially
treated.
Warranty
and condi-
tion.

The law on this subject is to be found chiefly in the decisions on the sale of goods ; the principles however are of general importance, and not without analogies, as we shall presently see, in other doctrines commonly treated as quite peculiar to equity. We therefore mention the leading points in this place, though very briefly. In the first place a buyer has a right to expect a merchantable article answering the description in the contract (a) ; but this is not on the ground of warranty, but because the seller does not fulfil the contract by giving him something different. “ If a man offers to buy *peas* of another and he sends

(a) *Jones v. Just*, L. R. 3 Q. B. 197, 204.

him *beans*, he does not perform his contract ; but that is not a warranty ; there is no *warranty* that he should sell him peas ; the contract is to sell peas, and if he sends anything else in their stead it is a non-performance of it" (a). So that, even if it be a special term of the contract that the buyer shall not refuse to accept goods bought by sample on the score of the *quality* not being equal to sample, but shall take them with an allowance, he is not bound to accept goods of a different *kind* (b). It is open to the parties to add to the ordinary description of the thing contracted for any other term they please, so as to make that an essential part of the contract : a term so added is a *condition*. If it be not fulfilled the buyer is not bound to accept or keep the goods even if there has been a bargain and sale of specific goods (c). A *warranty* is an undertaking which, though part of the contract, is "collateral to the express object of it" (d). When specific goods have been sold with a warranty the buyer cannot reject them (e), but may obtain compensation by way of deduction from the price, or by a cross action (f).

When there has been a sale with a warranty of goods not in existence or not ascertained, and the warranty is broken, the buyer may refuse to accept the goods, and this after keeping them, if necessary, for a time reasonably sufficient for trial or examination, provided he has not exercised further acts of ownership over them (g). This appears at first sight to put a warranty on the same footing as a condition where the sale is not of specific goods : but the true explanation is that given by Lord Abinger—that the tender of an article not corresponding

(a) Lord Abinger, C. B. in *Chanter v. Hopkins*, 4 M. & W. 399, 404 ; "as sound an exposition of the law as can be" per Martin, B. *Azémar v. Casella* (Ex. Ch.) L. R. 2 C. P. 677, 679.

(b) *Azémar v. Casella*, L. R. 2 C. P. 431, in Ex. Ch. 677.

(c) Benjamin on Sale, 488 sqq.

(d) Lord Abinger, C.B. in *Chanter v. Hopkins*, *supra*.

(e) *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447, but as to the application of the rule in the particular case see Mr. Benjamin's remarks, p. 742 of his book.

(f) The reduction of the price can be only the actual loss of value : any further damages must be the

subject of a cross claim, which under the old practice required a separate action : *Mondel v. Steel*, 8 M. & W., 858, 871. But a defendant can now recover his whole damages by counter-claim, and have judgment for the balance if it be in his favour. Rules of the Supreme Court, Ord. XIX. r. 3, Ord. XXII. r. 10.

(g) *Heilbutt v. Hickson*, L. R. 7 C. P. 438, 451 ; Indian Contract Act, s. 118. It is not the buyer's duty to send the goods back : it is enough for him to give a clear notice that they are not accepted, and then it is the seller's business to fetch them : *Grimoldby v. Wells*, L. R. 10 C. P. 391, 396.

to the warranty is not a performance of the contract (*a*). The warranty retains its peculiar effect in this, that if the buyer chooses to accept the goods, he has a distinct collateral right of action on the warranty; whereas if there is a condition but not a warranty the party may indeed insist on the condition, but if he accepts performance of the contract without it he may have no claim to compensation. Whether any term of a contract is in fact a condition or a warranty is a question of construction depending on the language used and to some extent on the nature and circumstances of the transaction (*b*).

Marine
Insurance:
duty of
disclosure.

A. *Marine Insurance.*

The law as to the contract of marine insurance is peculiar. Not only misrepresentation but concealment (*c*) of a material fact, "though made without any fraudulent intention, vitiates the policy" (*d*), that is, makes it voidable at the underwriter's election (*e*).

For this purpose a material fact does not, on the one hand, mean only such a fact as is "material to the risks considered in their own nature"; nor on the other hand does it include everything that might influence the underwriter's judgment: the rule is "that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act" (*f*). The only exception is that the insured is not bound to communicate anything which is such matter of general knowledge that he is entitled to assume the underwriter knows it already (*g*): and the obligation extends not only to facts actually within the knowledge of the assured, but to facts which in the ordinary

(*a*) And see Benjamin on Sale, 748.

(*b*) An instructive case of a simple affirmation amounting under special circumstances to a condition is *Bannerman v. White*, 10 C. B. N. S. 844, 31 L. J. C. P. 28; Benjamin on Sale, 490.

(*c*) This is the usual word, but *non-disclosure* would be more accurate.

(*d*) *Ionides v. Pender*, L. R. 9 Q. B.

531, 537; 2 Wms. Saund. 555-9.

(*e*) See *Morrison v. Universal Marine Insurance Co.* L. R. 8 Ex. 197, 205.

(*f*) Parsonson on Insurance, adopted per Cur. *Ionides v. Pender*, L. R. 9 Q. B. at p. 539. What falls within this description is a question of fact: *Stribley v. Imperial Marine Insurance Co.* 1 Q. B. D. 507.

(*g*) *Morrison v. Universal Marine Insurance Co.* L. R. 8 Ex. 40.

course of business he ought to know, though by the fraud or negligence of his agent he does not know them (*a*).

These rules have in modern times at any rate been uniformly treated both at law and in equity as determined by the exceptional and speculative nature of this particular contract, and not affording ground for any conclusions of general law. That they do not apply to the contract of life insurance is clear from the judgments in the Exchequer Chamber in *Wheelton v. Hardisty* (*b*), though a different opinion formerly prevailed, and in this very case was not contradicted in the court below. Practically life policies are almost always framed with some sort of express reference to the statements made by the assured as to the health and circumstances of the life insured. Not unfrequently it is provided that the declaration of the assured shall be the basis of the contract; and if the declaration thus made part of the contract is not confined to the belief of the party, but positive and unqualified, then the contract is avoided by any material part of the statements being in fact untrue, though not to the knowledge of the assured (*c*). Where the insurance is on the party's own life, however, any untrue answer given by himself to such questions as are usually asked by insurance offices would be almost necessarily known to be untrue, and therefore fraudulent apart from any special conditions. Where a third person insures, he on whose life the insurance is made (usually called "the life") cannot be treated as the agent of the assured, and false statements made by him or his referees cannot be pleaded as a fraud entitling the insurer to avoid the contract (*d*).

Distinctions as to life insurance.

(*a*) *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511. But non-disclosure by an agent of the assured, without fraudulent intention, avoids the policy only to the extent of the loss or risk arising from the particular facts so withheld: *Stribley v. Imperial, &c., Co.*, *supra*.

(*b*) 8 E. & B. 232, in Ex. Ch. 285; 26 L. J. Q. B. 265, 27 *ib.* 241; see especially those of Crowder, J. and Martin and Bramwell, BB. *Lindenau v. Desborough*, 8 B. & C. 586, is virtually overruled by this. The actual decision was probably right on the terms of the policy (see 8 E. & B. 248), but this does not

appear in the report.

(*c*) *Macdonald v. Law Union Insurance Co.* L. R. 9 Q. B. 328.

(*d*) *Wheelton v. Hardisty*, *supra*. The learned editor of Smith's Mercantile Law (402, 8th ed.) seems to understand the case as deciding this point only, and treats *Lindenau v. Desborough* as still law; but the ground of the decision in the Ex. Ch. was distinctly "that there was no express stipulation in the policy that made the accuracy of the statements the basis of the contract:" per Blackburn, J., L. R. 9 Q. B. 333. And see Leake, 200-202.

The late case of *Atty.-Gen. v. Ray* belongs to the class here considered: the grant of a life annuity by the Commissioners for the Reduction of the National Debt was set aside at the suit of the Crown, the age of the life having been misstated; not so much on the ground of misrepresentation simply, as because, considering the statutory powers and duties of the commissioners, "it was an essential part of the contract itself that the representation should be true" (a).

Fire Insurance.

B. *Fire Insurance.*

This contract is for similar reasons treated in somewhat the same way as that of marine insurance, though not to the same extent. The description of the insured premises annexed to a fire policy amounts to a warranty (or rather warranty in the nature of a condition) that at the date of the policy the premises correspond to the description, or at least have not been altered so as to increase the risk; and also that during the time specified in the policy the assured will not voluntarily make any alteration in them such as to increase the risk. The description must be the basis of the contract, for the terms of insurance can be calculated only on the supposition that the description in the policy shall remain substantially true while the risk is running (b). There are dicta in the books which seem to extend the analogy to marine insurance beyond this; but it is conceived that since *Wheelton v. Hardisty* (last p.) they cannot be relied on.

Description of goods in bill of lading, &c.

The effect of a misdescription of the goods in a bill of lading, apart from any fraudulent intention, *e.g.* of avoiding payment of a higher rate of freight, is not precisely settled: but it seems that at most it would limit the carrier's liability to what the value of the goods would be if the description were correct (c).

At common law the concealment of the true value of goods

(a) 9 Ch. 397, 407, per Mellish, L. J. expressly comparing the case of a life policy where the representations of the assured are made the basis of the contract.

(b) *Sillem v. Thornton*, 3 E. & B. 868, 23 L. J. Q. B. 362; where it was held accordingly that the addition of a third story to a house described as being of two stories was a material alteration, and discharged

the insurer: and see further, as to what amounts to material misdescription, *Forbes & Co.'s claim*, 19 Eq. 485.

(c) *Lebeau v. General Steam Navigation Co.* L. R. 8 C. P. 88. The point decided is that the addition of the words "Weight, value, and contents unknown" by the shipowner is an entire waiver of the description.

was held to excuse a common carrier for anything short of actual misfeasance, at all events if he had given notice that he would accept valuable parcels only on special terms (*a*): but this matter is now regulated by statute (*b*).

C. Suretyship.

It is laid down that a surety is released from his obligation by any misrepresentation or concealment amounting to misrepresentation of a material fact on the part of the creditor (*c*). The language used in different cases is hardly consistent: the later decisions establish however that the rule is not parallel to that of marine insurance: the creditor is not bound to volunteer information as to the general credit of the debtor or anything else which is not part of the transaction itself to which the suretyship relates: and on this point there is no difference between law and equity (*d*). But the surety is entitled to know the real nature of the transaction he guarantees and of the liability he is undertaking: and he generally and naturally looks to the creditor for information on this point, although he usually is acting at the debtor's request and as his friend, and so relies on him for collateral information as to general credit and the like. In that case the creditor's description of the transaction amounts to, or is at least evidence of, a representation that there is nothing further that might not naturally be expected to take place between the parties to a transaction such as described. Whether a circumstance not disclosed is such that by implication it is represented not to exist depends on the nature of the transaction and is generally a question of fact (*e*). Thus where the suretyship was for a cash credit opened with the principal debtor by a bank, and the cash credit was in fact applied to pay off an old debt to the bank, the House of Lords held that the bank was not bound to disclose this, no actual agreement being alleged or shown that the money should be so applied, and the thing being one which the surety might

Suretyship.
Misrepresentation avoids contract.

Surety is entitled to know real nature of transaction.

(*a*) *Batson v. Donovan*, 4 B. & Ald. 21.

(*b*) *Smith*, Merc. Law, 279 sqq.

(*c*) *Railton v. Mathews*, 10 Cl. & F. 934.

(*d*) *Pledge v. Buss*, Johns. 663, *Wythes v. Labouchere*, 3 De G. & J. 593, 609, approving *North British*

Insurance Co. v. Lloyd, 10 Ex. 523, 24 L. J. Ex. 14.

(*e*) *Lee v. Jones*, 14 C. B. N. S. 386, in Ex. Ch. 17 C. B. N. S. 482, 503, 34 L. J. C. P. 131, 138, which may be taken as a judicial commentary on the rule given in *Hamilton v. Watson*, 12 Cl. & F. 109.

naturally expect to happen (a). So the creditor is not bound to tell the surety that the proposed guaranty is to be substituted for a previous one given by another person (b). But the surety is not liable if there is a secret agreement or arrangement which substantially varies the nature of the transaction or of the liability to be undertaken: as where the surety guarantees payment for goods to be sold to the principal debtor, but the real bargain, concealed from the surety, is that the debtor shall pay for the goods a nominal price, exceeding the market price, and the excess shall be applied in liquidation of an old debt (c): or where the loan to be guaranteed is obtained not in the ordinary way, but by an advance of trust funds of which the principal debtor himself is a trustee (d). In *Lee v. Jones* (e) there was a continuing guaranty of an agent's liabilities in account with his employers. He was in fact already indebted to them beyond the whole amount guaranteed by the surety's agreement, which was so worded as to cover existing as well as future liabilities. The surety was not informed of this, and the recitals in the agreement, though not positively false, were of a misleading and dissembling character. The majority of the Court of Exchequer Chamber held that there was evidence of "studied effort to conceal the truth" amounting to fraud. And on the whole it appears from this case and *Railton v. Mathews* (f) that the concealment from the surety of previous defaults of the principal debtor, when there is a continuing guaranty of conduct or solvency, is in itself evidence of fraud. Where a person has become a surety on the faith of the creditor's representation that another will become co-surety, he is not bound if that other person does not join; and in equity it makes no difference that the guaranty was under seal (g). Where a guaranty was given to certain

(a) *Hamilton v. Watson*, 12 Cl. & F. 109; acc. *Pledge v. Buss*, Johns. 663.

(b) *North British Insurance Co. v. Lloyd*, 10 Ex. 523, 24 L. J. Ex. 14.

(c) *Pidcock v. Bishop*, 3 B. & C. 605; I. C. A. s. 143, illust. b.

(d) *Squire v. Whitton*, 1 H. L. C. 333, decided however chiefly on the broader ground that there cannot be a contract of suretyship *in blank*, for no creditor was ever named or specified to the surety.

(e) 17 C. B. N. S. 482, 34 L. J. Ex. 131.

(f) 10 Cl. & F. 934.

(g) *Rice v. Gordon*, 11 Beav. 465, *Evans v. Bremridge*, 2 K. & J. 174, 8 D. M. G. 100. The rule does not apply if the surety's remedies are not really diminished: *Cooper v. Evans*, 4 Eq. 45, where the principal debtor had not executed the bond, but had executed a separate agreement under seal.

judgment creditors in consideration of their postponing a sale under an execution already issued against the principal debtor, but in fact they did not stop the sale, being unable to do so without the consent of other persons interested, it was held that the guaranty was inoperative (a) ; but perhaps this case is best accounted for as one of simple failure of consideration ; for the consideration for the guaranty was not merely the credit given to the principal debtor, but the immediate stopping of the sale.

The authorities, taken as a whole, establish that as between creditor and surety there is in point of law no positive duty to give information as to the relations between the creditor and the principal debtor, but the surety is discharged if there is actual misrepresentation, and that silence may in a particular case be equivalent to an actual representation, whether it is so being a question of fact (b). So far as these rules attach special duties to the creditor they do not apply to a mere contract of indemnity (c).

Beyond this no positive duty to give information.

D. Sales of land.

A misdescription materially affecting the value, title, or character of the property sold will make the contract voidable at the purchaser's option both at law and in equity, and this notwithstanding special conditions of sale providing that errors of description shall be matter for compensation only. *Flight v. Booth* (d) is a leading case on this subject. The contract was for the sale of leasehold property, and the lease imposed restrictions against carrying on several trades, of which the particulars of sale named only a few : it was held that the purchaser might rescind the contract and recover back his deposit. Tindal, C. J. put the reason of the case on exactly the same grounds which, as we shall immediately see, have been relied on in like cases by courts of equity.

Sales of land: contract voidable for material misdescription.

“ Where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter

(a) *Cooper v. Joel*, 1 D. F. J. 240.

(b) Cp. I.C.A. ss. 142-144 S. 143 : “ Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance is invalid,” is probably not intended to go beyond the English law,

(c) *Way v. Hearn*, 13 C. B. N. S. 292, 32 L. J. C. P. 34 : but the point of that case is rather that there was no misrepresentation *dans locum contractui*.

(d) 1 Bing. N. C. 870, 377.

of the contract that it may reasonably be supposed that but for such misdescription the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts the purchaser may be considered as not having purchased the thing which was really the subject of the sale."

So in *Phillips v. Caldcleugh* (a), where the contract was for the sale of "a freehold residence"—which means free of all incumbrances (a)—and it appeared that the property was subject to restrictive covenants of some kind, the purchaser was held entitled to rescind, though the covenants were in a deed prior to that fixed by the contract as the commencement of the title.

Specific performance and compensation in equity.

In equity questions of this kind often arise in suits for specific performance between vendors and purchasers of real estate, when it is found that the actual tenure, quantity, or description of the property varies from that which was stated in the contract. The effect of the conditions of sale in the particular instance has almost always to be considered, and the result of the variance may be very different according to these, and according to the amount and importance of the discrepancy between the description and the fact (b).

Where variance not substantial, contract enforceable, but with compensation, at suit of either party.

(i). "If the failure is not substantial, equity will interfere" and enforce the contract at the instance of either party with proper compensation (c). The purchaser, "if he gets substantially that for which he bargains, must take a compensation for a deficiency in the value" (d). Here the contract is valid and binding on both parties, and the case is analogous to a sale of specific goods with a collateral warranty.

Where variance substantial and capable of pecuniary estimation, party

(ii). There is a second class of cases in which the contract is voidable at the option of the purchaser, so that he cannot be forced to complete even with compensation at the suit of the vendor, but may elect either to be released from his bargain or to perform it with compensation. "Generally speaking, every purchaser has a right to take what he can get, with compensation

(a) L. R. 4 Q. B. 159, 161.

(b) See authorities collected on the subject generally, Dart, V. & P. 134 sqq., 644, 654, 1055, 1067, sqq.

(c) *Halsey v. Grant*, 13 Ves. 73, 77.

(d) *Dyer v. Hargrave*, 10 Ves. 506, 508.

for what he cannot get" (a), even where he is not bound to accept what the other has to give him (b).

However a purchaser's conduct may amount to an affirmation of the contract and so deprive him of the right to rescind, but without affecting the right to compensation (c); again, special conditions may exclude the right to insist on compensation and leave only the right to rescind (d).

Under this head fall cases of misdescription affecting the value of the property, such as a statement of the existence of tenancies, not showing that they are under leases for lives at a low rent (e); or an unqualified statement of a recent occupation at a certain rent, the letting value of the property having been meanwhile ascertained to be less, and that occupation having been peculiar in its circumstances (f); or the description of the vendor's interest in terms importing that it is free from incumbrances—such as "immediate absolute reversion in fee simple"—where it is in fact subject to undisclosed incumbrances (g). The proper mode of assessing compensation in a case of misstatement of profits has been recently considered in the Court of Appeal (h).

The treatment of this class of cases in equity is analogous to the rules applied at common law to the sale of goods not specifically ascertained by sample or with a warranty: see p. 465, above.

The doctrine that a vendor who has less than he undertook to sell is bound to give so much as he can give with an abatement of the price applies, it is to be understood, only where the vendor has contracted to give the purchaser something which he professed

misled
may re-
scind con-
tract, or
enforce it
with com-
pensation.

Excep-
tions.

(a) *Hughes v. Jones*, 3 D. F. J. 307, 315; *Leyland v. Illingworth* 2 D. F. J. 248, 252.

(b) "If a person possessed of a term for 100 years contracts to sell the fee he cannot compel the purchaser to take, but the purchaser can compel him to convey the term." Per Lord Eldon, *Wood v. Griffith*, 1 Swanst. at p. 54 (though in this case not with compensation, see next page): and see *Mortlock v. Buller*, 10 Ves. 292, 315.

(c) *Hughes v. Jones*, *supra*.

(d) *Cordingley v. Cheeseborough*, 3 Giff. 496, 4 D. F. J. 379, where the purchaser claiming specific per-

formance with compensation, and having rejected the vendor's offer to annul the contract and repay the purchaser his costs, was made to perform the contract unconditionally. See further as to the effect of conditions of this kind *Mawson v. Fletcher*, 6 Ch. 91.

(e) *Hughes v. Jones*, 3 D. F. J. 307.

(f) *Dimmock v. Hallett*, 2 Ch. 21.

(g) *Torrance v. Bollon*, 8 Ch. 118.

Of the peculiar character of the non-disclosure in that case presently. Cp. *Phillips v. Caldcleugh*, L. R. 4 Q. B. 159, p. 472 above.

(h) *Powell v. Elliott*, 10 Ch. 424.

to be, and the purchaser thought him to be, capable of giving. Where a husband and wife had agreed to sell the wife's estate (her interest being correctly described and known to the purchaser), and the wife would not convey, the Court refused to compel the husband to convey his own interest alone for an abated price (a).

Also the Court will not order vendors who sell as trustees to perform their contract with compensation, on account of the prejudice to the cestui que trust which might ensue (b).

Where
variance
not capa-
ble of esti-
mation,
option to
rescind
simply.

(iii). But lastly the variance may be so material (either in quantity, or as amounting to a variance in *kind*) as to avoid the sale altogether and to prevent not merely the general jurisdiction of the Court as to compensation, but even special provisions for that purpose from having any application. "If a man sells freehold land, and it turns out to be copyhold, that is not a case for compensation (c); so if it turns out to be long leasehold, that is not a case for compensation; so if one sells property to another who is particularly anxious to have the right of sporting over it, and it turns out that he cannot have the right of sporting, because it belongs to somebody else . . . in all those cases the Court simply says it will avoid the contract, and will not allow either party to enforce it unless the person who is prejudiced by the error be willing to perform the contract without compensation" (d). This class of cases agrees with the last in the contract being voidable at the option of the party misled, but it differs from it in this, that if he elects to adopt the contract at all he must adopt it unconditionally, since compulsory performance with compensation would here work the same injustice to the one party that compulsory performance without compensation would work to the other. Such was the result in the case now cited of the real quantity of the property

(a) *Castle v. Wilkinson*, 5 Ch. 534. In a late case where the husband had the reversion in fee after a life interest to the wife, specific performance with compensation was granted: *Barker v. Cox*, 4 Ch. D. 464; *sed qu.*

(b) *White v. Cuddon*, 8 Cl. & F. 766.

(c) And conversely, a man who buys an estate as copyhold is not

bound to accept it if it is in fact freehold. For "the motives and fancies of mankind are infinite; and it is unnecessary for a man who has contracted to purchase one thing to explain why he refuses to accept another:" *Ayles v. Cox*, 16 Beav. 28.

(d) *Earl of Durham v. Legard*, 34 Beav. 611.

falling short by nearly one-half of what it had been supposed to be (a). But in a later case where the vendors were found to be entitled only to an undivided moiety of the property which they had professed to sell as an entirety, the Court found no difficulty in ordering specific performance with an abatement of half the price at the suit of the purchaser, as no injustice would be done to the vendors, who would be fully paid for all they really had to sell (b). The real question is whether the deficiency is such as to be fairly capable of a money valuation (c). It seems that where it is in the vendor's power to make good the description of the property, but not by way of money compensation, it may be in his option to perform the contract with the non-pecuniary compensation applicable to the circumstances or to treat it as rescinded. In a recent case a lot of building land (part of a larger estate intended to be sold together) was sold under restrictive conditions as to building, and in particular that no public-house was to be built; the purchaser assumed from the plan and particulars of sale, and in the opinion of the Court with good reason, that the whole of the adjoining property would be subject to like restrictions. One small adjacent plot had in fact been reserved by the vendor out of the estate to be sold, so that it would be free from restrictive covenants; but this did not sufficiently appear from the plan. The vendor sued for specific performance. It was held that he was entitled at

Where it is in vendor's power to make good his representations, *quære*.

(a) The price asked had been fixed by reference to the rental alone. *Qu.* how the case would have stood could a price proportional to the area have been arrived at. And see *Swaisland v. Dearsley*, 27 Beav. 430 (where it is left doubtful whether the purchaser could or could not have enforced the contract with compensation). Cp. D. 18. 1. de cont. emt. 22-24, enunciating precisely the same principle as that applied by our courts of equity. *Hanc legem venditionis: Si quid sacri vel religiosi est, eius venit nihil, supervacuum non esse, sed ad modica loca pertinere: ceterum si omne religiosum, vel sacrum, vel publicum venierit, nullam esse emtionem:* and see *cod. tit. 18, 40 pr.* In *Whittemore v. Whittemore*, 8 Eq. 603, a case of material deficiency in quantity, it was held that a con-

dition of sale providing generally that errors of description should be only matter of compensation did apply, but another excluding compensation for errors in quantity did not; so that on the whole the purchaser could not rescind, but was entitled to compensation.

(b) *Bailey v. Piper*, 18 Eq. 683. *Wheatley v. Slade*, 4 Sim. 126, is practically overruled by this. *Maw v. Topham*, 19 Beav. 576, is distinguishable, as there the purchaser knew or ought to have known that a good title could not be made to the whole.

(c) See *Dyer v. Hargrave*, 10 Ves. at p. 507; and on the distinction of the different classes of cases generally, per Amphlett, B. *Phillips v. Miller*, L. R. 10 C. P. 427-8.

his option to a decree for specific performance, on the terms of entering into a restrictive covenant including the reserved plot, or to have his bill dismissed (*a*). It is rather difficult to see why the option should not have been with the purchaser. The vendor had the means of performing what must be taken to have really been his contract (for a man cannot be heard to say that the natural construction and meaning of the contract he proposes, whether by a verbal description of the subject-matter, or by words helped out by maps or other symbols, is not the meaning he intended: *accipiuntur fortius contra proferentem* (*b*): and it might have been a not unsound or unjust conclusion to hold that he was simply bound to perform it.

This third class of cases may be compared (though not exactly) to a sale of goods subject to a condition or "warranty in the nature of a condition," so that the sale is "to be null if the affirmation is incorrect" (*c*).

Deposit
&c. re-
coverable
in equity
as well as
at law.

A purchaser who in a case falling under either of the last two heads exercises his option to rescind the contract may sue in the Chancery Division to have it set aside, and recover back in the same action any deposit and expenses already paid under the contract (*d*). And it seems that there is an independent right to sue in equity for the return of the deposit and expenses, at all events if there are any accompanying circumstances to afford ground for equitable jurisdiction, such as securities having been given of which the specific restitution is claimed (*e*).

General
duty of
vendor
to give
correct
descrip-
tion.

To return to the more general question, it is the duty of the vendor to give a fair and unambiguous description of his property and title. If he does not intend to offer for sale an unqualified estate, the qualifications should appear on the face of the particulars (*f*). In *Torrance v. Bolton* (*g*) an estate was offered for

(*a*) *Baskcomb v. Beckwith*, 8 Eq. 100. The case comes very near *Bloomer v. Spittle*, 13 Eq. 427, and others of that class, explained pp. 416, 456, above.

(*b*) 2 Sm. L. C. 525; D. 2.14. de pactis, 39 D. 18. 1 de cont. emt. 21.

(*c*) *Bannerman v. White*, 10 C. B. N. S. 844, 31 L. J. C. P. 28.

(*d*) *E.g. Stanton v. Tattersall*, 1 Sm.

& G. 529, *Torrance v. Bolton*, 8 Ch. 118.

(*e*) *Aberaman Ironworks Co. v. Wickens*, 4 Ch. 101, where the contract having been rescinded by consent before the suit was held not to deprive the Court of jurisdiction.

(*f*) *Hughes v. Jones*, 3 D. F. J. 307, 314.

(*g*) 8 Ch. 118.

sale as an immediate reversion in fee simple. At the auction conditions of sale were read aloud from a manuscript, but no copy given to the persons who attended the sale. One of these conditions showed that the property was subject to three mortgages. The plaintiff in the suit had bid and become the purchaser at the sale, but without having, as he alleged, distinctly heard the conditions or understood their effect. The Court held that the particulars were misleading; that the mere reading out of the conditions of sale was not enough to remove their effect and to make it clear to the mind of the purchaser what he was really buying; and that he was entitled to have the contract rescinded and his deposit returned.

Concealment in particulars not excused by correct statement in conditions only read out at the sale: *Torrance v. Bolton*.

A misleading description may be treated as a misrepresentation even if it is in terms accurate: for example, where property was described as "in the occupation of A." at a certain rental, and in truth A. held not under the vendor, but under another person's adverse possession (a), or where immediate possession is material to the purchaser, and the tenant holds under an unexpired lease for years which is not disclosed (b). "There should be perfectly good faith on the part of the vendor in the representations which he makes to the purchaser" (a).

All this proceeds on the supposition that the vendor's property and title are best known to himself, as almost always is the case. But the position of the parties may be reversed: a person who has become the owner of a property he knows very little about may sell it to a person well acquainted with it, and in that case a material misrepresentation by the purchaser makes the contract, and even an executed conveyance pursuant to it, voidable at the vendor's option (c). So it is where the purchaser has done acts unknown to the vendor which alter their position and rights with reference to the property: as where there is a coal mine under the land and the purchaser has trespassed upon it and raised coal without the vendor's knowledge: for here the proposed purchase involves a buying up of rights against the purchaser of which the owner is not aware (d).

The House of Lords decided in *Wilde v. Gibson* (e) that the Non-disclosure of

(a) *Lachlan v. Reynolds*, Kay 52.

(b) *Caballero v. Henty*, 9 Ch. 447.

(c) *Haygarth v. Wearing*, 12 Eq. 320.

(d) *Phillips v. Homfray*, 6 Ch. 770, 779.

(e) 1 H. L. C. 605.

defect of
title not
actually
known to
vendor:
Wilde v.
Gibson.

vendor's silence as to a right of way over the property, of the existence of which he was not shown to be aware, was no ground for setting aside the contract. This reversed the decision of Knight Bruce, V.-C., (*a*) who held that the silence of the particulars taken together with the condition of the property (for the way had been enclosed) amounted to an assertion that no right of way existed. In any view it seems an extraordinary, not to say dangerous, doctrine to say that a vendor is not bound to know his own title, so far at least as with ordinary diligence he may know it: and the case is severely criticized by Lord St. Leonards (*b*). The Irish case relied on by the Lords as a direct authority may be distinguished on the ground that the representation there made by the lessor that there was no right of way was made not merely with an honest belief, but with a reasonable belief in its truth (*c*)

The decision in *Wilde v. Gibson* was much influenced by the purchaser's case having been rested in the pleadings to a certain extent upon charges of actual fraud, which however were abandoned in argument: the doctrine of constructive notice, it was said, could not be applied in support of an imputation of direct personal fraud. Even so the result in modern practice would only be that the plaintiff would have to pay the costs occasioned by the unfounded charges; he would not lose any relief for which he otherwise showed sufficient grounds (*d*). And on examining the pleadings it is difficult to find any imputation sufficient to justify the grave rebukes expressed in the judgments (*e*). Altogether the case strongly illustrates the confusion and inconvenience which may follow from the use of the word fraud with a latitude inconsistent with its ordinary and natural meaning. It was also said by Lord Campbell that a court of equity will not set aside an executed conveyance on the ground of misrepresentation or concealment, but only for actual fraud (*f*): but this

(*a*) S. C. *nom. Gibson v. D'Este*, 2 Y. & C. 542.

(*b*) Sugd. Law of Property, 614, 637, &c.

(*c*) Indeed the Court seems to have thought it *was* true, notwithstanding the adverse result of an action. *Legge v. Croker*, 1 Ball & B. 506, Sugd. *op. cit.* 657.

(*d*) *Hilliard v. Eiffe*, L. R. 7 H.

L. 39; see next chapter.

(*e*) The bill in *Gibson v. D'Este*, which is to be found in the printed cases of 1848, has the words "carefully concealed" in one passage: "fraudulently concealed" in another may mean, of course, fraudulently in a technical sense.

(*f*) 1 H. L. C. 632.

dictum has not been followed. In a late case where copyhold land had been sold as freehold, apparently in good faith, the sale was set aside after conveyance (a). Here, however, the seller had notice when he bought the land himself that some part of it at least was copyhold. On the other hand there may be a want of diligence on the purchaser's part which, although not such as to deprive him of the right of rescinding the contract before completion, would preclude him from having the sale set aside after conveyance (b).

As a general result of the authorities there seems to be no doubt that on sales of real property it is the duty of the party acquainted with the property to give substantially correct information, at all events to the extent of his own actual knowledge, of all facts material to the description or title of the estate offered for sale. General rule.

The rule seems not applicable as between lessor and lessee, where the letting is for an occupation by the lessee himself, and so far as concerns any physical fact which can be covered by inspection; for in ordinary circumstances the landlord is entitled to assume that the tenant will go and look at the premises for himself, and therefore is not bound to tell him if they are in bad repair or even ruinous (c). Exception as to occupation leases.

E. *Family Settlements.*

In the negotiations for family settlements and compromises it is the duty of the parties and their professional agents not only to abstain from misrepresentations, but to communicate to the other parties all material facts within their knowledge affecting the rights to be dealt with. The omission to make such communication, even without any wrong motive, is a ground for setting aside the transaction. "Full and complete communication of all material circumstances is what the Court

Family settlements: duty of full disclosure.

(a) *Hart v. Swaine*, 7 Ch. D. 42; also in *Haygarth v. Wearing*, 12 Eq. 320, an executed conveyance was set aside on simple misrepresentation.

(b) *McCulloch v. Gregory*, 1 K. & J. 286, where a will was misstated in the abstract so as to conceal a de-

fect of title, but the purchaser omitted to examine the originals.

(c) *Keates v. Earl Cadogan*, 10 C. B. 591, 20 L. J. C. P. 76. The general rule does apply as to matters of title: *Mostyn v. West Mostyn Coal, &c., Co.* 1 C. P. D. 145.

must insist on" (a). "Without full disclosure honest intention is not sufficient," and it makes no difference if the non-disclosure is due to an honest but mistaken opinion as to the materiality or accuracy of the information withheld (b). The operation of this rule is not affected by the leaning of equity, as it is called, towards supporting re-settlements and similar arrangements for the sake of peace and quietness in families (c).

Contracts
to take
shares.
Prospectus
must be
both posi-
tively and
negatively
correct.

F. *Contracts to take Shares in Companies and Contracts of Promoters.*

"The public, who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character as the promoters themselves possess" (d): and those who issue a prospectus inviting people to take shares on the faith of the representations therein contained are bound "not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as an inducement to take shares" (e). Therefore if untrue or misleading representations are made as to the character and value of the property to be acquired by a company for the purposes of its operations (f), the privileges and position secured to it, the amount of capital (g), or the amount of shares already subscribed for (h), a person who has agreed to take shares on the faith of such representations, and afterwards discovers the truth, is entitled to rescind the contract and repudiate the shares, if he does so within a reasonable time and before a winding-up has given the com-

(a) *Gordon v. Gordon*, 3 Sw. 400, 473.

(b) *Ib.* 477. How far does this go? It can hardly be a duty to communicate mere gossip on the chance of there being something in it. Probably the test is (as in the case of marine insurance, p. 466. above) whether the judgment of a reasonable man would be affected.

(c) *Ib.*; *Fane v. Fane*, 20 Eq. 698.

(d) Lord Chelmsford in *Central Ry. Co. of Venezuela v. Kisch*, L. R.

2 H. L. 99, 113.

(e) *Kindersley, V.-C. New Brunswick, &c. Co. v. Muggeridge*, 1 Dr. & Sm. 363, 381, adopted by Lord Chelmsford, *l. c.*

(f) *Reese River Silver Mining Co. v. Smith*, L. R. 4. H. L. 64, affg. s. c. nom *Smith's ca.* 2 Ch. 604.

(g) *Central Ry. Co. of Venezuela v. Kisch*, *supra*.

(h) *Wright's ca.* 7 Ch. 55; cp. *Moore & De la Torre's ca.* 18 Eq. 661.

pany's creditors an indefeasible right to look to him as a contributory. For full information on this subject the reader is referred to Mr. Justice Lindley's treatise (a).

There is likewise a fiduciary relation between a promoter and the company in its corporate capacity, which imposes on the promoter the duty of full and fair disclosure in any transaction with the company, or even with persons provisionally representing the inchoate company before it is actually formed (b). Duty of promoter to company.

The Companies Act 1867, s. 38, makes it the duty of promoters of a company to disclose in the prospectus any previous contract entered into by the company or the promoters; in default of which the prospectus is deemed "fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same" as regards any one taking shares on the faith of the prospectus and without notice of the contract. This creates no duty on the part of any one who was not a promoter at the date of the contract (c), nor towards any one but shareholders (d): and it seems the right it gives the shareholder is to bring an action of deceit against the delinquent personally, and not to be released from his contract (e). The contracts mentioned in this very loosely drawn enactment include not only contracts binding or intended to bind the company itself, but all contracts involving dealings with the company's shares or assets which, if known to a prudent man, would be material to determine his judgment as to taking shares (e).

In the case of the contract to marry there is no special duty of disclosure, except so far as the woman's chastity is an implied condition. The non-disclosure of a previous and subsisting engagement to another person (f), or of the party's own previous insanity (g), is no answer to an action on the promise. If promises to marry are to give a right of action, one would think Contract to marry.

(a) Lindley on Partnership, 2. 328.
982, 1459.

(b) *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73; per James, L. J. at p. 118; *Bagnall v. Carlton*, 6 Ch. D. 371.

(c) *Gover's* ca. 20 Eq. 114, 1 Ch. D. 182.

(d) *Cornell v. Hay*, L. R. 8 C. P.

(e) *Twycross v. Grant*, (C. A.) 2 C. P. D. 469. The Court of Appeal was equally divided. Further legislation on the subject is expected.

(f) *Beachey v. Brown*, E. B. & E. 796, 29 L. J. Q. B. 105.

(g) *Baker v. Cartwright*, 10 C. B. N. S. 124.

the contract should be treated as one requiring the utmost good faith : but such are the decisions.

Marriage itself is not avoided even by actual fraud (*a*), but the reasons for this are obviously of a different kind : nor is a marriage settlement rendered voidable by the wife's non-disclosure of previous misconduct (*b*).

Of the effect of misrepresentation on validity of contracts in general. Action of deceit.

It now remains to see how the authorities stand as establishing or tending to establish a general rule for the treatment in equity of contracts entered into by one party in consequence of representations made by the other which were not true in fact, but not known to be untrue by the person making them.

The cases at common law have established that a false representation may be a substantive ground of action for damages though it is not shown that the person making the statement knew it to be false. It is enough to show that he made it with a view to secure some benefit to himself, or to deceive a third person, and without believing it to be true (*c*). On the other hand there is no actionable wrong in a representation which though untrue in fact is believed to be true by the person making it (*d*).

Silence is equivalent to misrepresentation for this purpose if "the withholding of that which is not stated makes that which is stated absolutely false," but not otherwise (*e*).

Right of rescinding contract

The state of things which gives the higher right to bring an action in the nature of the old common law action of deceit (*f*)

(*a*) *Swift v. Kelly*, 3 Knapp, P. C. 257, 298.

(*b*) *Evans v. Carrington*, 2 D. F. J. 481. It is there said however that non-disclosure of adultery would be enough to avoid a separation deed.

(*c*) *Taylor v. Ashton*, 11 M. & W. 401; *Evans v. Edmonds*, 13 C. B. 777. See Benjamin on Sale, 361-369, where the cases are fully discussed.

(*d*) *Taylor v. Ashton*, *supra*; *Collins v. Evans*, 5 Q. B. 820; *Ormrod v. Hutk*, 14 M. & W. 651. See notes to *Chandelor v. Lopus*, 1 Sm. L. C. 174; *Higgins v. Samels*, 2 J. & H. 460, 466. If a man affects to contract as an agent authorized by a principal, having in

fact no authority, it has been said that he may be sued on the false statement as a wrong, "even though he does not know it to be false, but believes without sufficient grounds that the statement will ultimately turn out to be correct:" per Cur. *Smout v. Nlbery*, 10 M. & W. 1, 9: see however 1 Sm. L. C. 178.

(*e*) *Peek v. Gurney*, L. R. 6 H. L. 377, 390, 403.

(*f*) The right is equitable as well as legal. Suits analogous to the action of deceit occurred in equity practice before the Judicature Acts, as in *Slim v. Croucher*, 1 D. F. J. 518; and see *Hill v. Lane*, 11 Eq. 215, 220; *Peek v. Gurney*, *supra*.

must obviously give the lesser right of simply avoiding the contract. But the two rights are not therefore co-extensive. One can see no reason on principle for assuming the converse proposition to be true, namely that a contract cannot be rescinded for misrepresentation unless an action of deceit could be maintained. It is one thing to say that a man's conduct in inducing another to contract with him does not amount to a substantive wrong, and another thing to say that he is entitled to enforce the contract. There is no doubt, however, that it has been at least the strong tendency of the common law to ignore the distinction. In courts of equity we find on the other hand a sufficiently marked though not wholly uniform disposition to recognize it. The actual decisions are for the most part on questions falling under one or other of the special heads we have already gone through, and this increases the difficulty of drawing general conclusions. But the presence of considerations of a more general kind is believed on the whole to justify the statement of the rule of equity given above (p. 464).

Lord Brougham laid down in *Attwood v. Small* (a), without any qualification or exception (beyond calling attention to the distinction between a simple representation and a warranty)—that the following things must all concur if a contract is to be set aside on the ground of false representation :

A representation contrary to the fact.

Knowledge of the party making it that it is contrary to the fact.

This representation being the cause of the other party's contracting (*dolus dans locum contractui*).

But it is certain, as we have just seen, that except for the purpose of establishing distinct and specific charges of fraud, the second of these conditions is subject to considerable exceptions in special, but large and important, classes of cases.

It is also sufficiently certain that mere ignorance as to the truth or falsehood of a material assertion which turns out to be untrue must be treated as equivalent to knowledge of its untruth. "If persons take upon themselves to make assertions as

not necessarily limited to same extent.

Dicta in *Attwood v. Small* too narrow.

Settled points : effect of reckless ignorance.

(a) 6 Cl. & F. 232, 444.

to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue" (*a*). In other words, wilful ignorance may have the same consequences as fraud (*b*). So may ignorance which, though not wilful, is negligent: as when positive assertions of fact are made as if founded on the party's own knowledge, whereas in truth they are merely adopted on trust from some other person. The proper course in such a case is to refer distinctly to the authority relied upon (*c*).

Negligent
ignorance
of facts
once
known.

It is no less established that a person who makes a wrong statement as to a fact which was once actually within his own knowledge, and which it is his business to remember, cannot excuse himself by alleging that he had forgotten it at the time of making the statement (*d*).

General
statements
in *Barry v.*
Croskey :
but this
rather
on the
question of
actionable
wrong.

On the general question Lord Hatherley, when Vice-Chancellor, laid down the following principles :

"First. Every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and so acting is injured or damnified.

Secondly. Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damnified—provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss (*e*).

Thirdly. The injury must be the immediate and not the remote consequence of the representation thus made" (*f*).

But these rules, it will be observed, are stated chiefly, and the second of them exclusively, with reference to liability *ex delicto* : and the suit in which the judgment was given was in

(*a*) Per Lord Cairns, *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 79; *Rawlins v. Wickham*, 3 De G. & J. 304, 316.

(*b*) *Owen v. Homan*, 4 H. L. C. at p. 1035.

(*c*) *Rawlins v. Wickham*, 3 De G. & J. at p. 313, *Smith's ca.* 2 Ch. at

p. 611.

(*d*) *Burrowes v. Lock*, 10 Ves. 490; *Slim v. Croucher*, 1 D. F. J. 518, 525.

(*e*) See *Peck v. Gurney*, L. R. 6 H. L. 396, 412.

(*f*) *Barry v. Croskey*, 2 J. & H. 122.

fact founded on a liability of that nature rather than a simple right of rescission. It seems to be assumed that the representation is made with knowledge of its untruth.

In *Jennings v. Broughton* (a), a suit to set aside a purchase of shares in a mine, the L. J. Knight Bruce said that (apart from another point to which we shall come afterwards) the questions were as follows: 1. In the representations made by the defendants was there any untrue assertion material in its nature, that is, "which, taken as true, added substantially to the value or promise of the mine, and was not evidently conjectural merely?" 2. If so, was it made without a belief in its truth by the person making it? 3. If made with such belief, was the belief entertained without fair or reasonable ground? It is submitted that this, notwithstanding the special nature of the case, was intended and is to be accepted as an accurate statement of the general law. More recently it has been said that "when a representation in a matter of business is made by one man to another calculated to induce him to adapt his conduct to it," knowledge of the representation being untrue is not material (b): but it was held in the particular case that there was in fact no misrepresentation.

The cases on misrepresentation in family settlements, especially the late one of *Fane v. Fane* (c), seem also to involve the general principle or head of equity, that a material statement of that which is untrue, though innocently made, is ground for avoiding a contract: but here, as we have already seen, there is held to be a special positive duty of communication.

On the whole we have thought it best to state the rule in a general form (p. 464 above), though it must be admitted that this goes beyond the letter of the authorities in their present state.

The subject was recently discussed in the House of Lords, but in an indecisive manner, in *Western Bank of Scotland v. Addie* (d), where Lord Chelmsford said in effect that a man is

Jennings v. Broughton.

Cases on family settlements.

Dicta in W. Bank of Scotland v. Addie indecisive.

(a) 5 D. M. G. 126, 130.

(c) 20 Eq. 698.

(b) *Malins, V.-C., Leather v. Simpson*, 11 Eq. 398, 406.

(d) L. R. 1 Sc. & D. 145, 162, 168.

not liable for an untrue statement made as "the result of a *bona fide* belief," but that this means a belief held on some reasonable grounds. Lord Cranworth seems to have thought, on the contrary, that the absence of reasonable grounds is material only as evidence that there was no real belief. But the authority of the dicta in this case is much diminished by the positive dissent since expressed (though not on this point, but on that of the liability of a corporation *ex delicto* for the fraud of its agent) by the Judicial Committee (a).

As to the party misled having means of knowledge: immaterial in case of active misrepresentation.

There remains another general question not wholly free from doubt, namely, whether any difference is made by the party misled having within his reach means of knowledge by which, if he had used them, he might have ascertained the truth.

In the case of active misrepresentation it is no answer in proceedings either for damages or for setting aside the contract to say that the party complaining of the misrepresentation had the means of making inquiries. "In the case of *Dobell v. Stevens* (b) . . . which was an action for deceit in falsely representing the amount of the business done in a public-house, the purchaser was held to be entitled to recover damages, although the books were in the house, and he might have had access to them if he had thought proper" (c). The like is held in equity. It was said of a purchaser to whom the state of the property he bought was misrepresented:—"Admitting that he might by minute examination make that discovery, he was not driven to that examination, the other party having taken upon him to make a representation. . . The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe" (d).

The principle is that "No man can complain that another has too implicitly relied on the truth of what he has himself stated" (e).

Otherwise if he acts on his own

If it is shown, indeed, that the person who complains of having been misled not only had the means of information within his

(a) See *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, followed in *Swire v. Francis*, 3 App. Ca. 106.

(b) 3 B. & C. 628.

(c) Per Lord Chelmsford, L. R.

2 H. L. 121.

(d) *Dyer v. Hargrave*, 10 Ves. at p. 509.

(e) *Reynell v. Sprye*, 1 D. M. G. at p. 710; *Price v. Macaulay*, 2 D. M. G. 339, 346.

reach, but actually used them, then he is taken to have acted not on the statement of the other party but on his own judgment, and he cannot claim relief. "The Court must be careful that in its anxiety to correct frauds it does not enable persons who have joined with others in speculations to convert their speculations into certainties at the expense of those with whom they have joined" (a).

In the case of *Attwood v. Small* (b) in the House of Lords there are various dicta on this subject not very consistent with one another. It is in one place (c) said that a party would not be relieved who had the means of ascertaining the truth "with ordinary prudence": on the other hand Lord Lyndhurst fully approved of *Dobell v. Stevens* (d); and it can hardly be said that in that case it would have been any very extraordinary act of prudence on the part of the purchaser to go into the house and look at the books for himself. However the general tendency of what was said in *Attwood v. Small* is to show that nothing short of actual inquiries, from which it can be inferred that the party acted on his own judgment, will preclude him from relief. And Lord Brougham suggested that a case might even be possible in which the false representations of a seller and the actual inquiries of a buyer should be so inextricably mixed up that the Court would not refuse to interfere (e). In the principal case the parties who sought to impeach a sale of mining property to them had (according to the view of the facts taken by the majority of the Lords) not only made inquiries by themselves and their agents to test the vendor's statements, but had continued in possession and exercised acts of ownership after all the facts were within their knowledge. There was therefore no positive decision on the point now under discussion.

But the principle has in a more recent case (f) been positively affirmed by Lord Chelmsford. The suit was instituted by a shareholder in a railway company to be relieved from his contract on the ground of misrepresentations contained in the prospectus. Here it was contended that the prospectus referred the intending

(a) *Jennings v. Broughton*, 5 D. M. G. 126, 140; *Dyer v. Hargrave*, 10 Ves. 505.

(b) 6 Cl. & F. 232.

(c) Per Earl of Devon, at p. 340,

(d) At p. 395 (see last p.).

(e) At p. 448.

(f) *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99, 120.

shareholder to other documents, and offered means of further information : besides, the memorandum and articles of association (and of these at all events he was bound to take notice) sufficiently corrected the errors and omissions of the prospectus. But the objection is thus answered :—

“ When once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, ‘ You at least, who have stated what is untrue, or have concealed the truth for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.’ ”

And other-
wise in
case of
mere non-
disclosure,
semble.

This doctrine appears, on the same authority, not to apply to the case of mere non-disclosure, without fraudulent intention, of a fact which ought to have been disclosed.

“ When the fact is not misrepresented but concealed [or rather not communicated] (a) and there is nothing done to induce the other party not to avail himself of the means of knowledge within his reach, if he neglects to do so he may have no right to complain, because his ignorance of the fact is attributable to his own negligence ” (b).

Mere
assertion
of title.

It appears also not to apply to a mere assertion of title by a vendor of land (c).

In a case before Lord Hatherley when V.-C. the double question arose of the one party's knowledge that his statement was untrue, and of the other's means of learning the truth. The suit was for specific performance of an agreement to take a lease of a limestone quarry. The plaintiff made a distinct representation as to the quality of the limestone which was in fact untrue : he did not believe it to be false, but he had taken no pains to ascertain, as he might easily have done, whether it was true or not. But then the defendant had not relied exclusively upon this statement, for he went to look at the stone ; still he was not a

(a) See L. R. 2. H. L. 339.

(b) *New Brunswick, &c. Co. v. Conybeare*, 9 H. L. C. 711, 742.

(c) *Hume v. Pocock*, 1 Ch. 379,

385, where however the real contract was to buy up a particular claim of title, whatever it might be worth.

lime burner by trade, and could not be supposed to have trusted merely to what he saw, being in fact not competent to judge of the quality of limestone. The result was that the Court refused specific performance, declining to decide whether the contract was otherwise valid or not (a).

PART 2.—FRAUD.

Fraud generally includes misrepresentation. Its specific mark **Fraud** is the presence of a dishonest intention on the part of him by **generally includes** whom the representation is made. In this case we have a mis- **misrepresentation.** take of one party caused by a representation of the other, which representation is made by deliberate words or conduct with the intention of thereby procuring consent to the contract, and without a belief in its truth.

There are some instances of fraud, however, in which one can hardly say there is a misrepresentation except by a forced use of **But not always:** language. It is fraudulent to enter into a contract with the **as when a** design of using it as an instrument of wrong or deceit against **contract** the other party. Thus a separation deed is fraudulent if the **is made with a** wife's real object in consenting or procuring the husband's **collateral** consent to it is to be the better able to renew a former illicit **wrongful or unlaw-** intercourse which has been concealed from him. "None shall **ful pur-** be permitted to take advantage of a deed which they have **pose, or** fraudulently induced another to execute that they may commit **without** an injury against morality to the injury and loss of the party by **intention** whom the deed is executed" (b). So it is fraud to obtain a **of per-** contract for the transfer of property or possession by a represen- **forming it.** tation that the property will be used for some lawful purpose, when the real intention is to use it for an unlawful purpose (c). It has been said that it is not fraud to make a contract without any intention of performing it, because peradventure the party may think better of it and perform it after all: but this was in a case where the question arose wholly on the form of the pleadings, and in a highly technical and now happily impossible

(a) *Higgins v. Samels*, 2 J. & H. 460, 468, 469.

(b) *Evans v. Carrington*, 2 D. F. J. 481, 501; cp. *Evans v. Edmonds*, 13 C. B. 777, where however express representation was averred.

(c) *Feret v. Hill*, 15 C. B. 207, 23 L. J. C. P. 185, concedes this, deciding only that possession actually given under the contract cannot be treated as a mere trespass by the party defrauded.

manner (a). And both before and since it has repeatedly been considered a fraud in law to buy goods with the intention of not paying for them (b). Here it is obvious that the party would not enter into the contract if he knew of the fraudulent intention : but the fraud is not so much in the concealment as in the character of the intention itself. It would be ridiculous to speak of a duty of disclosure in such cases. Still there is ignorance on the one hand and wrongful contrivance on the other, such as to bring these cases within the more general description of fraud given in Ch. VIII. p. 382 above.

Right of
rescinding
fraudulent
contract.

The party defrauded is entitled, and was formerly entitled at law as well as in equity, to rescind the contract. "Fraud in all courts and at all stages of the transaction has been held to vitiate all to which it attaches" (c). It does not matter whether the representation is made by express words or by conduct, nor whether it consists in the positive assertion or suggestion of that which is false, or in the active concealment of something material to be known to the other party for the purpose of deciding whether he shall enter into the contract. These elementary rules are so completely established and so completely assumed to be established in all decisions and discussions on the subject that it seems almost idle to cite any specific authorities for them : but we may give in a general way a few instances of the kind of representations which are held fraudulent.

Examples
of fraudu-
lent repre-
sentation.

There may be a false statement of specific facts : this seldom occurs in a perfectly simple form. *Canham v. Barry* (d) is a good example. There the contract was for the sale of a leasehold. The vendor was under covenant with his lessor not to assign without licence, and had ascertained that such licence would not be refused if he could find an eligible tenant. The agreement was made for the purpose of one M. becoming the

(a) *Hemingway v. Hamilton*, 4 M. & W. 115.

(b) *Ferguson v. Carrington*, 9 B. & C. 59 ; *Load v. Green*, 15 M. & W. 216, 15 L. J. Ex. 113 ; *White v. Garden*, 10 C. B. 919, 928, 20 L. J. C. P. 166 ; *Clough v. L. & N. W. Ry. Co.* L. R. 7 Ex. 26 ; *Ex parte Whittaker*, 10 Ch. 446, 449, per Mellish, L. J. ;

Donaldson v. Farwell, 3 Otto (93 U. S.) 631. But it is not such a "false representation or other fraud" as to constitute a misdemeanor under s. 11, sub-a. 19 of the Debtors Act, 1869 : *Ex parte Brett*, 1 Ch. D. 151.

(c) Per Wilde, B. *Udell v. Atherton*, 7 H. & N. at p. 181.

(d) 15 C. B. 597, 24 L. J. C. P. 100.

occupier, and the purchaser and M. represented to the vendor that M. was a respectable person and could give satisfactory references to the landlords, which was contrary to the fact. This was held to be a fraudulent misrepresentation of a material fact such as to avoid the contract. A more frequent case is where a person is induced to acquire or become a partner in a business by false accounts of its position and profits (a).

Or the representation may be of a general state of things: thus it is fraud to induce a person to enter into a particular arrangement by an incorrect and unwarrantable assertion that such is the usual mode of conducting the kind of business in hand (b). How far it must be a representation of existing facts will be specially considered.

“Active concealment” seems to be the appropriate description for the following sorts of conduct: taking means appropriate to the nature of the case to prevent the other party from learning a material fact—such as using contrivances to hide the defects of goods sold (c): or making a statement true in terms as far as it goes, but keeping silence as to other things which if disclosed would alter the whole effect of the statement, so that what is in fact told is a half truth equivalent to a falsehood (d): or allowing the other party to proceed on an erroneous belief to which one’s own acts have contributed (e). It is sufficient if it appears that the one party knowingly assisted in inducing the other to enter into the contract by leading him to believe that which was known to be false (f). Thus it is where one party has made an innocent misrepresentation, but on discovering the error does nothing to undeceive the other (g). As to this last point it is to be observed that in ordinary cases it is not the duty of one party to a contract to correct a misap-

What is
fraudulent
conceal-
ment.

As to mere
silence:

(a) *E.g. Rawlins v. Wickham*, 8 De G. & J. 304. The cases where contracts to take shares have been held voidable for misrepresentation in the prospectus are of the same kind.

(b) *Reynell v. Sprye*, 1 D. M. G. 680.

(c) See Benjamin on Sale, 384.

(d) *Peck v. Gurney*, L. R. 6 H. L. 392, 403.

(e) *Hill v. Gray*, 1 Stark. 484, as

explained in *Keates v. Earl Cadogan*, 10 C. B. 591, 600, 20 L. J. C. P. 76; *qu.* if the explanation does not really overrule the particular decision, per Lord Chelmsford, L. R. 6 H. L. 391; Benjamin, 385-6.

(f) Per Blackburn, *J. Lee v. Jones*, 17 C. B. N. S. at p. 507, 34 L. J. C. P. at p. 140.

(g) *Reynell v. Sprye*, 1 D. M. G. at p. 709.

Smith v.
Hughes.

prehension of the other to which he has done nothing to contribute, though he may be aware of it. "Passive acquiescence in a self-deception" (a) cannot be put on the same footing as an active encouragement of it which has the nature of "aggressive deceit" (b). Even if the one party asks the other a question as to some collateral matter on which he is not bound to give information, mere silence on the other's part is not equivalent to

Laidlaw v.
Organ.

a representation. This was decided by the American Supreme Court in *Laidlaw v. Organ* (c). The contract there in question was a sale of tobacco. On the morning of the sale the buyers knew, but the sellers did not know, that peace had been concluded between the United States and England. The sellers asked if there was any news affecting the market price. The buyers gave no answer, and the sellers did not insist on having one, and it was held that the silence of the buyers was not a fraudulent concealment. And, notwithstanding that the decision has been criticized (d), it seems right; for silence in such a case is of itself equivalent at most to saying, "It is not our business to tell you"; which indeed, as a part of the general law, the other party may be presumed to know already. The real question in such a case is whether there was nothing beyond mere silence. If there is evidence of any departure from the attitude of passive acquiescence, to that extent there is evidence of fraud; and perhaps it is not too much to say that the Court should be astute to find it.

Reckless
assertions.

Making an assertion with careless ignorance as to its truth or untruth is believed to be equivalent at law (e) as

(a) *Smith v. Hughes*, L. R. 6 Q. B. 597, 603.

(b) *Keates v. Earl Cadogan*, *supra*.

(c) 2 Wheat. 178. The case is almost exactly parallel to *Smith v. Hughes* (last note but one) but was not there cited.

(d) Story Eq. Jur. § 149. On the other hand it is in effect adopted as Illustration (d) to s. 17 of the Indian Contract Act: "A. and B. being traders, enter upon a contract. A. has private information of a change in prices which would affect B.'s willingness to proceed with

the contract. A. is not bound to inform B."

(e) Per Maule, J. *Erans v. Edmonds*, 13 C. B. 777, 786. "I conceive that if a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person, he is guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts."

well as in equity (a) to making it with knowledge of its untruth.

In this place we may note the special application of the doctrine of fraud to sales by auction. The courts of law held the employment of a puffer to bid on behalf of the vendor to be evidence of fraud in the absence of any express condition fixing a reserved price or reserving a right of bidding ; for such a practice is inconsistent with the terms on which a sale by auction is assumed to proceed, namely that the highest bidder is to be the purchaser, and is a device to put an artificial value on the thing offered for sale (b). There existed or was supposed to exist (c) in courts of equity the different rule that the employment of one puffer to prevent a sale at an undervalue was justifiable (d), with the extraordinary result that in this particular case a contract might be valid in equity which a court of law would treat as voidable on the ground of fraud. The Sale of Land by Auction Act, 1867, (30 & 31 Vict. c. 48) assimilated the rule of equity to that of law. The Indian Contract Act (s. 123) adopts the rule of the common law (e).

Sales by auction : employment of puffer.

It may also be mentioned here that marriage is an exception to the general rule : but marriage, though including a contract, is so much more than a contract that the exception is hardly a real one. It is the law of England, and probably of all civilized countries, that "unless the party imposed upon has been deceived as to the person and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made" (f).

Fraud does not avoid marriage.

Much less is a marriage rendered invalid by the parties or one of them having practised a fraud on the persons who performed the ceremony. Where a marriage had been celebrated in due form by Roman ecclesiastics at Rome between two Protestants, who had previously made a formal abjuration (the marriage not being otherwise possible by the law of the place as it then was),

(a) See p. 484 above.

(b) *Green v. Baverstock*, 14 C. B. N. S. 204, 32 L. J. C. P. 181.

(c) Doubt was thrown upon it in *Mortimer v. Bell*, 1 Ch. 10, 16.

(d) *Smith v. Clarke*, 12 Ves. 483 ; *Flint v. Woodin*, 9 Ha. 618.

(e) "If at a sale by auction the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer."

(f) *Swift v. Kelly*, 3 Knapp, 257, 293. As to promises to marry, *supra*, p. 481.

it was held immaterial whether the abjuration had been sincere or not, though as to the woman there was strong evidence to show that it was not (a).

Consent
of third
persons
obtained
by fraud.

We may also observe in this place that when the consent of a third party is required to give complete effect to a transaction between others, that consent may be voidable if procured by fraud, and the same rules are applied, so far as applicable, which determine the like questions as between contracting parties. Thus where the approval of the directors is necessary for the transfer of shares in a company, a false description of the transferee's condition, such as naming him "gentleman" when he is a servant or messenger, or a false statement of a consideration paid by him for the shares, when in truth he paid nothing or was paid to execute the transfer, is a fraud upon the directors, the object being to mislead them by the false suggestion of a real purchase of the shares by a man of independent position ; and on a winding-up the Court will replace the transferor's name on the register for the purpose of making him a contributory (b).

(a) *Swift v. Kelly*, 3 Knapp, 257.

(b) *Ex parte Kintrea*, 5 Ch. 95,

Payne's ca. and *Williams' ca.* 9 Eq. 223 ; *Lindley*, 2. 1486.

CHAPTER X.

THE RIGHT OF RESCISSION.

WE have now to examine a class of conditions which apply indifferently, or very nearly so, to cases of simple misrepresentation and cases of fraud. Some of them, indeed, extend to all contracts which are or have become voidable for any cause whatever.

Examina-
tion of
questions
on rescis-
sion of
voidable
contracts.

The questions to be dealt with may be stated as follows :

What must be shown with regard to the representation itself to give a right to relief to the party misled ?

What is the extent of that right, and within what bounds can it be exercised ?

1. As to the representation itself.

A. It must (except, perhaps, in a case of actual fraud) be a representation of fact, as distinguished on the one hand from matter of law, and on the other hand from a matter of mere intention.

As to the
representa-
tion relied
on for
rescinding
a contract.
It must be
of matter
of fact,
not of law
(but *qu.*
as to
deliberate
fraud).

As to the first branch of the distinction, there is authority at common law that a misrepresentation of the legal effect of an instrument by one of the parties to it does not enable the other to avoid it (*a*). And in equity there is no reason to suppose that the rule is otherwise, though the authorities only go to this extent, that no independent liability can arise from a misrepresentation of what is purely matter of law (*b*). But this probably

(*a*) *Lewis v. Jones*, 4 B. & C. 506.
Not so if the actual contents or nature of the instrument are misrepresented, as we saw in Ch. VIII.

(*b*) *Rashdall v. Ford*, 2 Eq. 750 ;

Beattie v. Lord Ebury, 7 Ch. 777, 802, L. R. 7 H. L. 102, 130 (the House of Lords held there was no misrepresentation at all).

does not apply to a deliberately fraudulent mis-statement of the law (a). The circumstances and the position of the parties may well be such as to make it not imprudent or unreasonable for the person to whom the statement was made to rely on the knowledge of the person making it: and it would certainly work injustice if it were held necessary to apply to such a case the maxim that every one is presumed to know the law.

And not
of mere
motive or
intention.

As to the second branch, we must put aside the cases already mentioned in which the substance of the fraud is not misrepresentation, but a wrongful intention going to the whole matter of the contract. Apart from these it appears to be the rule that a false representation of motive or intention, not amounting to or including an assertion of existing facts, is inoperative. "It is always necessary to distinguish, when an alleged ground of false representation is set up, between a representation of an existing fact which is untrue and a promise to do something in future" (b). On this ground was put the decision in *Vernon v. Keys* (c), where the defendant bought a business on behalf of a partnership firm. The price was fixed at 4,500*l.* on his statement that his partners would not give more: a statement afterwards shown to be false by the fact that he charged them in account with a greater price and kept the resulting difference in their shares of the purchase-money for himself. It was held that the vendor could not maintain an action of deceit, as the statement amounted only to giving a false reason for not offering a higher price. The case also illustrates the principle that collateral fraud practised by or against a third person does not avoid a contract. Here there was fraud, and of a gross kind, as between the buyer and his partners; but we must dismiss this from consideration in order to form a correct estimate of the decision as between the buyer and seller. It must be judged of as if the buyer had communicated the whole thing to his partners and charged them only with the price really given. Still the decision is difficult to accept. For the buyer was the agent of the firm, and in substance

(a) *Hirschfeld v. London, Brighton, & South Coast Ry. Co.*, 2 Q. B. D. 1.

(b) *Mellish, L. J., Ex parte Burrell*, 1 Ch. D. at p. 552.

(c) 12 East 682, in Ex. Ch. 4 Taunt. 488. The language used in

the Ex. Ch. to the effect that the buyer's liberty must be co-extensive with the seller's, which is to "tell every falsehood he can to induce a buyer to purchase," is of course not to be literally accepted.

made a false statement of a distinct matter of fact touching the extent of his authority, though it was no doubt a matter as to which he was not bound to make any statement or to answer any questions. And it has been lately held in the Privy Council that it is clearly fraudulent for A. and B. to combine to sell property in B's name, B. not being in truth the owner but only an intermediate agent, and the nominal price not being the real price to be paid to the owner A., but including a commission to be retained by B. (a). This seems to shake the authority of *Vernon v. Keys*, though it cannot actually overrule the decision (b). This difficulty, however, affects only the particular application of the doctrine on which the Court proceeded.

But there are a series of decisions in equity which establish a somewhat different rule. Where a contract has been entered into upon the representations of one party that he will do something material to the other party's interest under it, and he does not make good that representation, he cannot enforce specific performance of the contract (c): and in one case the contract has even been set aside at the suit of the party misled. No doubt it would be possible in most if not in all of these cases to treat the representation as amounting to a collateral agreement, and perhaps in the last case to say that the original contract was conditional on its performance. But the judgments seem studiously to avoid that mode of handling the subject (d): otherwise we should venture to suggest this as the more correct and convenient view, and perhaps it deserves attention that the bearing of the decision in *Jorden v. Money* (e) on this particular question does not appear

Cases in equity on principle of "making representations good."

(a) *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, 243.

(b) The decisions of the Judicial Committee, though they carry great weight, are not binding in English Courts: and the Court of Appeal has lately refused to follow the Judicial Committee on a point of considerable importance: *Leask v. Scott*, 2 Q. B. D. 376.

(c) *Peacock v. Penson*, 11 Beav. 355, is perhaps an authority that the other party may sue for specific performance with fulfilment of the collateral representation or compensation in the alternative. But the Court appears to have treated the representation as substantially em-

bodied or implied in the contract itself.

(d) *Myers v. Watson*, 1 Sim. N. S. 523, *Lamare v. Dixon*, L. R. 6 H. L. 414, 428, per Lord Cairns: Lord Chelmsford does use the word agreement, at p. 423; and see last note.

(e) 5 H. L. C. 185. The consideration of that decision in *Piggott v. Stratton*, 1 D. F. J. 33, is not inconsistent with the statement in the text. For the case was one of equitable estoppel, so far as not decided on the ground of actual contract, and the representation was not of intention, but that a certain state of things existed and would continue to exist.

to have been as yet seriously discussed. In the first set of cases, where specific performance was refused, the vendor or lessor had represented that he would do something for the purchaser's or lessee's benefit, either in the way of repair or improvement on the property itself (*a*), or by executing works on adjoining property as part of a general plan (*b*). In the one case which goes farther the contract was a partial re-insurance effected by one insurance society (A.) with another (B.) for one-third of the original risk, on the understanding that one-third was to be re-insured in like manner with another office C., and the remaining one-third retained by A., the first insurers. This last one-third was afterwards re-insured by A. with C. without communication with B. It was held that society B. was entitled to set aside the policy of re-insurance given by it on the faith that society A. would retain part of the liability. And it was said to make no difference that such an intention was really entertained at the time: for the change of intention ought to have been communicated. "If a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances" (*c*). On the whole the view taken in the cases appears

They seem to involve the assertion of a substantive right, even where the representation is not an agreement. to be that the representation of a definite thing or state of things as existing or about to exist, though it may not amount to an agreement, gives a person to whom it was made and who has acted upon it a substantive right in equity to have the representation made good (*d*): and then, on the principle of avoiding circuitry of action, this right involves that of resisting the enforcement of a contract obtained by such representation if

(*a*) *Lamare v. Dixon*, *supra*.

(*b*) *Beaumont v. Dukes*, Jac. 422, *Myers v. Watson*, *supra*.

(*c*) *Traill v. Baring*, 4 D. J. S. 318, 329, per Turner, L. J.

(*d*) As in *Slim v. Croucher*, 1

D. F. J. 518. Where the representation is fraudulent, the remedy in equity becomes parallel to the legal remedy by action of deceit: but this element is not necessary.

the representation has not been fulfilled, or even of preventing it by a suit for rescission. A complete exposition of the subject by a Court of Appeal is much to be desired.

B. The representation must be such as to induce the contract (*dans locum contractui*) (a).

This proposition is illustrated by the cases already referred to in the last chapter, showing that a party can have no relief on the ground of misrepresentation or fraud if in truth he has acted not on the representations of the other but on his own judgment of facts fully before him or on the results of inquiries made by himself. The case of *Horsfall v. Thomas* (b) was decided on the same principle; there a contrivance was used to conceal a defect in a gun manufactured to a purchaser's order, but the purchaser took it without any inspection, and therefore in the judgment of the Court could not say he had been in fact deceived.

The representation must induce the contract: but a material representation is presumed to have induced it.

It might also be given as a rule that the representation must be material. But to make this quite accurate it should be stated in the converse form, namely that a material representation may be presumed to have in fact induced the contract: for a man who has obtained a contract by false representations cannot afterwards be heard to say that those representations were not material. The excuse has often been put forward that for anything that appeared the other party might no less have given his consent if the truth had been made known to him, and the Court has always been swift to reject it. When a falsehood is proved, the Court does not require positive evidence that it was successful (c); it rather presumes that assent would not have been given if the facts had been known (d). Those who have made false statements cannot ask the Court to speculate on the exact share they may have had in inducing the transaction (e); or on what might have been the result if there had been a full communication of the truth (f): it is enough that an untrue statement has been

(a) Per Lord Brougham, *Attwood v. Small*, 6 Cl. & F. 444; per Lord Wensleydale, *Smith v. Kay*, 7 H. L. C. 775-6.

(b) 1 H. & C. 90, 81 L. J. Ex. 322, but see per Cockburn, C. J. *Smith v. Hughes*, L. R. 6 Q. B. at p. 605.

(c) *Williams*' ca. 9 Eq. 225, n.

(d) *Ex parte Kintrea*, 5 Ch. at p. 101.

(e) *Reynell v. Sprye*, 1 D. M. G. at p. 708.

(f) *Smith v. Kay*, 7 H. L. C. at p. 759.

made which was likely to induce the party to enter into the contract, and that he has done so (a).

In like manner, if there has been an omission even without fraud to communicate something which ought to have been communicated, it is too late to discuss whether the communication of it would probably have made any difference (b).

If it be asked in general terms what is a material fact, we may answer, by an extension of the language adopted by the Queen's Bench in a case of marine insurance (c), that it is anything which would affect the judgment of a reasonable man governing himself by the principles on which men in practice act in the kind of business in hand.

And contract incidental to fraudulent transaction is itself treated as fraudulent.

There is an exception, but only an apparent one, to the rule that the representation must be the cause of the other party's contracting. A contract arising directly out of a previous transaction between the same parties which was voidable on the ground of fraud is itself in like manner voidable. A. makes a contract with B., with the fraudulent intention of making it impossible by a secret scheme for B. to perform the contract. B. ultimately agrees to pay and does pay to A. a sum of money to be released from the contract: if he afterwards discovers the scheme B. can rescind this last agreement and recover the money back (d).

"If the promoter of a company procures a company to be formed by improper and fraudulent means, and for the purpose of securing a profit to himself, which, if the company was successful, it would be unjust and inequitable to allow him to retain [in the particular case a secret payment to the promoter out of purchase-money] and the company proves abortive and is ordered to be wound up without doing any business, the promoter cannot be allowed to prove against the company in the winding up, either in respect of his services in forming the company or in respect of his services as an officer of the company after the company was registered" (e).

So it is where the parties really interested, though not the nominal parties, are the same. Thus where a sale of goods is

(a) Per Lord Denman, C. J. *Watson v. Earl of Charlemont*, 12 Q. B. 856, 864.

(b) *Traill v. Baring*, 4 D. J. S. at p. 330.

(c) *Ionides v. Pender*, L. R. 9 Q. B.

539; *supra*, p. 466.

(d) *Barry v Croskey*, 2 J. & H. 1.

(e) Per Cur. *Hereford & S. Wales Waggon & Engineering Co.* 2 Ch. D. 621, 626.

procured by fraud, and the vendors forward the goods by railway to the purchaser's agent, and afterwards reclaim them, indemnifying the railway company, these facts constitute a good defence to an action by the purchaser's agent against the railway company, though the re-delivery to the vendors was before the discovery of the fraud and arose out of an unsuccessful attempt to stop the goods *in transitu* (a).

C. The representation must be made by a party to the contract. This rule in its simple form is elementary. It is obvious that A. cannot be allowed to rescind his contract with B. because he has been induced to enter into it by some fraud of C. to which B. is no party (b). Thus in *Sturge v. Starr* (c) a woman joined with her supposed husband in dealing with her interest in a fund. The marriage was in fact void, the man having concealed from her a previous marriage. It was held that this did not affect the rights of the purchaser. And so if A. effects an insurance on the life of B., false statements made by B. to the insurance office concerning his own health, but not known by A. to be false, do not in the absence of special conditions avoid the contract (d).

Must be made by a party to the contract.

But when we come to deal with contracts made by agents the question arises to what extent the representations of the agent are to be considered as the representations of the principal for the purposes of this rule. And this question, though now practically if not absolutely set at rest by recent decisions, is one which has given rise to some difficulty. A false statement made by an agent with his principal's express authority, the principal knowing it to be false, is obviously equivalent to a falsehood told by the principal himself; and we do not know that this has ever been disputed, or that it has been ever supposed to make any difference whether the agent knows the statement to be false or not. But we may also have the following cases. The statement may be not expressly authorized by the principal, nor known to be untrue by him, but known to be untrue by the agent; or con-

As to representations made by agents.

(a) *Clough v. L. & N. W. Ry. Co.* (Ex. Ch.) L. R. 7 Ex. 26, an exceedingly instructive case: as to the misconceived act being justified by reference to the true ground of rescission afterwards discovered, cp.

Wright's ca. 7 Ch. 55.

(b) See per Lord Cairns, *Smith's ca.* 2 Ch. at p. 616.

(c) 2 My. & K. 195.

(d) *Wheelton v. Hardisty*, 8 E. & B. 232, 285, 27 L. J. Q. B. 241.

versely, the statement may be not known to the agent to be untrue, and not expressly authorized by the principal, the true state of the facts being, however, known to the principal. There is no doubt that in the first case the principal is responsible both at law and in equity, subject only to the limitation to be presently stated. In the second case there is every reason to believe that the same rule holds good. At common law there has been a much canvassed decision to the contrary (*a*), which, however, has been practically overruled by the remarks since made upon it (*b*), or at any rate cut down to a decision on a point of pleading which perhaps cannot, and certainly need not, ever arise again.

The only question is whether the representation was within the agent's authority.

Barwick v. English Joint Stock Bank, Mackay v. Commercial Bank of New Brunswick.

We can at once see that the above distinctions are material, if at all, only when there is a question of fraud in the strict sense, and then chiefly when it is sought to make the principal liable *ex delicto*. Where a non-fraudulent misrepresentation suffices to avoid the contract, there it is clear that the only thing to be ascertained is whether the representation was in fact within the scope of the agent's authority. But it may be now taken as the law that this is the only question even in a case of fraud. It was so laid down in a recent case by a considered judgment of the Exchequer Chamber (*c*), fully approved by more recent decisions of the Judicial Committee (*d*). According to this the rule is "that the master is answerable for every such wrong," including fraud, "of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." Although the master may not have authorized the particular act, yet if "he has put the agent in his place to do that class of acts" he must be answerable for the agent's conduct. It makes no difference whether the principal is a natural person or a corporation (*e*). In both of these cases, accordingly, a banking corporation was held to be liable for a false representation made by

(*a*) *Cornfoot v. Fowler*, 6 M. & W. 358.

(*b*) 2 Sm. L. C. 88: and see especially per Willes, J. in *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 262.

(*c*) *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259.

(*d*) *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, 411. *Swire v. Francis*, 3 App. Ca. 106.

(*e*) L. R. 5 P. C. 413-5; *Swift v. Jewsbury*, (Ex. Ch.) L. R. 9 Q. B. at p. 312, per Lord Coleridge, C. J.

one of its officers in the course of the business usually conducted by him on behalf of the bank ; and this of course involves the proposition that the party misled is entitled to rescind the contract induced by such representation. On the whole there seems to be no room for serious doubt that the law of England as now settled is correctly expressed by s. 238 of the Indian Contract Act :—

“ Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals ; but misrepresentations made or frauds committed by agents in matters which do not fall within their authority do not affect their principals.”

The directors and other officers of companies, acting within the functions of their offices, are for this purpose agents, and the companies are bound by their acts and conduct. Conversely, where directors employ an agent for the purposes of the company, and that agent commits a fraud in the course of his employment without the personal knowledge or sanction of the directors, the remedy of persons injured by the frauds is not against the directors, who are themselves only agents, but against the company as ultimate principal (a). And reports made in the first instance to a company by its directors, if afterwards adopted by a meeting and “ industriously circulated,” must be treated as the representations of the company to the public, and as such will bind it (b). Statements in a prospectus issued by promoters before the company is in existence cannot indeed be said with accuracy to be made by agents for the company : for one cannot be an agent even by subsequent ratification for a principal not in existence and capable of ratifying at the time (c). But such statements also, if afterwards expressly or tacitly adopted, become the statements of the company. It is a principle of general application, by no means confined to these cases, that if A. makes an assertion to B., and B. repeats it to C. in an unqualified manner, intending him to act upon it, and C. does act upon it, B. makes that assertion his own and is answerable for its consequences. If he would

Directors
and Pro-
motors.

(a) *Weir v. Barnett*, 3 Ex. D. 32.

(b) Per Lord Westbury, *New Brunswick &c. Co. v. Conybeare*, 9 H. L. C. 711, 725.

(c) P. 233 above. *Contra Spiller v. Paris Skating Rink Co.*, 7 Ch. D 368,

guard himself, it is easy for him to say: "This is what A. tells me, and on his authority I repeat it; for my own part I believe it, but if you want any further assurance it is to him you must look" (a).

Agent
always
liable for
his own
personal
fraud.

It is to be borne in mind that in a case of actual fraud on the part of an agent the responsibility of the principal does not in any way exclude the responsibility of the agent. "All persons directly concerned in the commission of a fraud are to be treated as principals"; and in this sense it is true that an agent or servant cannot be authorized to commit a fraud. He cannot excuse himself on the ground that he acted only as agent or servant (b).

The repre-
sentation
must be in
the same
transac-
tion.

D. The representation must be made as part of the same transaction.

It is believed that the statement of the rule in this form, though at first sight vague, is really more accurate than that which presents itself as an alternative, but is in fact included in this—namely that the representation must be made to the other party or with a view to his acting upon it. The effect of the rule is that the untruth of a representation made to a third person, or even to the party himself on some former occasion, in the course of a different transaction and for a different purpose, cannot be relied on as a ground either for rescinding a contract or for maintaining an action of deceit. Thus in

Western
Bank of
Scotland
v. Addie.

Western Bank of Scotland v. Addie (c) the directors of the bank had made a series of flourishing but untrue reports on the condition of its affairs, in which bad debts were counted as good assets. The shareholder who sought relief in the action had taken additional shares on the faith, as he said, of these reports. But it was not shown that they were issued or circulated for the purpose of inducing existing shareholders to take more shares, or that the local agent of the bank who effected this

(a) *Smith's* ca. 2 Ch. 604, 611; p. 484 above; and further, as to the application of the doctrines of agency to partners and directors on these points, Lindley, l. 333; but note the effect of *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, on the law as

there stated and the dicta there cited.

(b) Per Lord Westbury, *Cullen v. Thomson's Trustees and Kerr*, 4 Macq. 424, 432; *Swift v. Winterbotham*, L. R. 8 Q. B. 244, 254.

(c) L. R. 1 Sc. & D. 145.

particular sale of shares used them or was authorized to use them for that purpose. Thus the case rested only on the purchaser having acted under an impression derived from these reports at some former time; and that was not such a direct connexion between the false representation and the conduct induced by it as must be shown in order to rescind a contract. This, however, was not the only ground of the decision.

In *Peek v. Gurney* (a) the important point is decided that the sole office of a prospectus is to invite the public to take shares in the company in the first instance. Those who take shares in reliance on the prospectus are entitled to their remedy if the statements in it are false. But those statements cannot be taken as addressed to all persons who may hereafter become purchasers of shares in the market; and such persons cannot claim any relief on the ground of having been deceived by the prospectus unless they can show that it was specially communicated to them by some further act on the part of the company or the directors. Some former decisions the other way (b) are expressly overruled. The proceeding there in hand was in the nature of an action of deceit, but the doctrine must equally apply to the rescission of a contract.

Peek v. Gurney.

In *Way v. Hearn* (c) the action was on a promise by the defendant to indemnify the plaintiff against half of the loss he might sustain by having accepted a bill drawn by one R. Shortly before this, in the course of an investigation of R.'s affairs in which the defendant took part, R. had at the plaintiff's request concealed from the accountant employed in the matter the fact that he owed a large sum to the plaintiff; the plaintiff said his reason for this was that he did not wish his wife to know he had lent so much money upon bad security. At this time the bill which was the subject of the indemnity was not thought of; it was in fact given to get rid of an execution afterwards put in by another creditor. Here a misrepresentation as to R.'s solvency was made by R. in concert with the

Way v. Hearn.

(a) L. R. 6 H. L. 377, 395: and see the case put by Lord Cairns as an illustration at p. 411.

(b) *Bedford v. Bagshaw*, 4 H. & N. 538, 29 L. J. Ex. 59; *Bagshaw v. Seymour*, 18 C. B. 903, 29 L. J. Ex. 62, n. The authority of

Gerhard v. Bates, 2 E. & B. 476, 22 L. J. Q. B. 364, is saved by a rather fine distinction: L. R. 6 H. L. 399.

(c) 13 C. B. N. S. 292, 32 L. J. C. P. 34.

plaintiff, and communicated to the defendant; but it was in a transaction unconnected with the subsequent contract between the plaintiff and the defendant, and the defendant was therefore not entitled to dispute that contract on the ground of fraud.

As to
rights of
party
misled:
general
statement.

2. As to the right of the party misled. This right is one which requires, and in several modern cases of importance has received, an exact limitation and definition. It may be thus described:

The party who has been induced to enter into a contract by fraud or misrepresentation may affirm the contract and insist, if that is possible, on being put in the same position as if the representation had been true:

Or he may at his option rescind the contract within a reasonable time (*a*) after discovering the misrepresentation, unless it has become impossible to restore the parties to the position in which they would have been if the contract had not been made, or unless any third person has in good faith and for value acquired any interest under the contract.

It will be necessary to dwell separately on the several points involved in this. And it is to be observed that the principles here considered are not confined to any particular ground of rescission, but apply generally when a contract is voidable, either for fraud or on any other ground, at the option of one of the parties; on a sale of land, for example, it is constantly made a condition that the vendor may rescind if the purchaser takes any objection to the title which the vendor is unable to remove; and then these rules apply so far as the nature of the case admits.

Of affirma-
tion and
rescission
in general.

A. As to the nature of the right in general, and what is an affirmation or rescission of the contract.

“A contract induced by fraud is not void, but voidable only at the option of the party defrauded;” in other words, valid until rescinded (*b*).

Where the nature of the case admits of it, the party misled

(*a*) But *qu.* whether time is in itself material: see L. R. 7 Ex. 35, 8 Ex. 205,

(*b*) *Oakes v. Turquand*, L. R. 2 H. L. 346 375-6.

may affirm the contract and insist on having the representation made good. If the owner of an estate sells it as unincumbered, concealing from the purchaser the existence of incumbrances, the purchaser may if he thinks fit call on him to perform his contract and redeem the incumbrances (a). If promoters of a partnership undertaking induce persons to take part in it by untruly representing that a certain amount of capital has been already subscribed for, they will themselves be put on the list of contributories for that amount (b).

It is to be remembered that the right of election, and the possibility of having the contract performed with compensation, does not exclude the option of having the contract wholly set aside. "It is for the party defrauded to elect whether he will be bound" (c). But if he does affirm the contract, he must affirm it in all its terms. Thus a vendor who has been induced by fraud to sell goods on credit cannot sue on the contract for the price of the goods before the expiration of the credit: the proper course is to rescind the contract and sue in trover (d).

When the contract is once affirmed, the election is completely determined; and for this purpose it is not necessary that the affirmation should be express. Any acts or conduct which unequivocally treat the contract as subsisting, after the facts giving the right to rescind have come to the knowledge of the party, will have the same effect (e). Taking steps to enforce the contract is a conclusive election not to rescind on account of anything known at the time (f). A shareholder cannot repudiate his shares on the ground of misrepresentations in the prospectus if he has paid a call without protest or received a dividend after he has had in his hands a report showing to a reader of ordinary intelligence that the statements of the prospectus were not true (g), or if after discovering the true state of things he has taken an active part in the affairs of the company (h) or has

What shall determine election.

(a) Per Romilly, M. R. in *Pulford v. Richards*, 17 Beav. 96. Cp. *Ungley v. Ungley*, 5 Ch. D. 887.

(b) *Moore and De la Torre's ca.* 18 Eq. 661.

(c) *Rawlins v. Wickham*, 3 De G. & J. 804, 822.

(d) *Ferguson v. Carrington*, 9 B. & C. 59. This is unimportant in practice now that the old forms of action are abolished, but it is re-

tained as a good illustration of the principle.

(e) *Clough v. L. & N. W. Ry. Co.* Ex. Ch.) L. R. 7 Ex. at p. 84.

(f) *Gray v. Fowler* (Ex. Ch.), L. R. 8 Ex. 249, 280.

(g) *Scholey v. Central Ry. Co. of Venezuela*, 9 Eq. 266, n.

(h) *Sharpley v. Louth & East Coast Ry. Co.* (C. A.) 2 Ch. D. 668.

affirmed his ownership of the shares by taking steps to sell them (a); and in general a party who voluntarily acts upon a contract which is voidable at his option, having knowledge of all the facts, cannot afterwards repudiate it if it turns out to his disadvantage (b). And when the right of repudiation has once been waived by acting upon the contract as subsisting with knowledge of facts establishing a case of fraud, the subsequent discovery of further facts constituting "a new incident in the fraud" cannot revive it (c). The exercise of acts of ownership over property acquired under the contract precludes a subsequent repudiation, but not so much because it is evidence of an affirmative election as because it makes it impossible to replace the parties in their former position; a point to which we shall come presently.

When the acts done are of this kind it seems on principle immaterial whether there is knowledge of the true state of affairs or not, unless there were a continuing active concealment or misrepresentation practised with a view to prevent the party defrauded from discovering the truth and to induce him to act upon the contract: for then the affirmation itself would be as open to repudiation as the original transaction. Something like this occurs not unfrequently in cases of undue influence, as we shall see in the next chapter.

Omission to repudiate within a reasonable time is evidence, and may be conclusive evidence, of an election to affirm the contract; and this is in truth the only effect of lapse of time. Still it will be more convenient to consider this point separately afterwards.

Election to rescind must be communicated to other party.

If on the other hand the party elects to rescind, he is to manifest that election by distinctly communicating to the other party his intention to reject the contract and claim no interest under it. One way of doing this is to institute proceedings to have the contract judicially set aside, and in that case the judicial rescission, when obtained, relates back to the date of the

(a) *Ex parte Briggs*, 1 Eq. 483; this however was a case not of misstated facts but of material departure from the objects of the company as stated in the prospectus, as to which see *Lindley*, l. 109, 118.

(b) *Ormes v. Beadel*, 2 D. F. J. 332, 336.

(c) *Campbell v. Fleming*, 1 A. & E. 40. This does not apply where a new and distinct cause of rescission arises: *Gray v. Fowler*, L. R. 8 Ex. 249.

commencement of such proceedings (a). Or if the other party is the first to sue on the contract, the rescission may be set up as a defence, and this is itself a sufficient act of rescission without any prior declaration of an intention to rescind (b). For the purposes of pleading the allegation that a contract was procured by fraud has been held to import the allegation that the party on discovering it disaffirmed the contract (c). Where the rescission is not declared in judicial proceedings, no further rule can be laid down than that there should be "prompt repudiation and restitution as far as possible" (d). The communication need not be formal, provided it is a distinct and positive rejection of the contract, not a mere request or inquiry, which is not enough (e). Thus in the case of shares in a company a repudiation expressed by word of mouth to the secretary at the company's office will do (f). But it seems that if notwithstanding an express repudiation the other party persists in treating the contract as in force, then judicial steps should be taken in order to make the rescission complete as against rights of third persons which may subsequently intervene (g). Where the original contract was made with an agent for the other party, communication of the rescission to that agent is sufficient, at all events before the principal is disclosed (h). And where good grounds for rescission exist, and the contract is rescinded by mutual consent on other grounds, those grounds not being such as to give a right of rescission, and the agent's consent being in excess of his authority,

What
communi-
cation
sufficient.

(a) *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 73-5. What if proceedings were commenced in an incompetent court? On principle there seems no reason why that also should not be effective as an act of rescission in pais. The proposition that in equity "the mere assertion of a claim unaccompanied by any act to give effect to it" is not enough (*Clegg v. Edmondson*, 8 D. M. G. 787, 810) refers only to substantive original rights, and must not be extended to acts of repudiation. In the particular case it was a claim to share in certain partnership profits.

(b) *Clough v. L. & N. W. Ry. Co.* (Ex. Ch.), L. R. 7 Ex. 88.

(c) *Daves v. Harness*, L. R. 10 C. P. 166. The earlier cases there cited,

especially *Deposit Life Assurance Co. v. Ayscough*, 6 E. & B. 761, 26 L. J. Q. B. 29, are not wholly consistent.

(d) Per Bramwell, B. *Bulch-y-Plwm Lead Mining Co. v. Baynes*, L. R. 2 Ex. 326.

(e) *Ashley's ca.* 9 Eq. 263, may perhaps be supported on this ground. Otherwise the distinction of it from *Paule's ca.* (next note but one) seems untenable.

(f) *McNiell's ca.* 10 Eq. 503.

(g) *Kent v. Freehold Land &c. Co.* 3 Ch. 493. *Sal qu.* At any rate, if there are several repudiating shareholders in a like position, proceedings taken by one of them and treated by the company as representative will enure for the benefit of all: *Paule's ca.* 4 Ch. 497.

(h) *Maynard v. Eaton*, 9 Ch. 414.

yet the rescission stands good. There is nothing more that the party can do, and when he discovers the facts on which he might have sought rescission as a matter of right he is entitled to use them in support of what is already done. In *Wright's* (a) case the prospectus of a company contained material misrepresentations. The directors had at a shareholder's request, and on other grounds, professed to cancel the allotment of his shares, which they had no power to do, though they had power to accept a surrender. Afterwards the company was wound up, and then only was the misrepresentation made known to him. But it was held that as there was in fact a sufficient reason for annulling the contract, which the directors knew at the time though he did not, the contract was effectually annulled, and he could not be made a contributory even as a past member (b).

Right of rescission exercisable by and against representatives.

Inasmuch as the right of rescinding a voidable contract is alternative and co-extensive with the right of affirming it, it follows that a voidable contract may be avoided by or against the personal representatives of the contracting parties (c). And further, as a contract for the sale of land is enforceable in equity by or against the heirs or devisees of the parties, so it may be avoided by or against them where grounds of avoidance exist (d).

No rescission unless parties can be restored to former position.

B. The contract cannot be rescinded after the position of the parties has been changed so that the former state of things cannot be restored.

Where the party in fault has acted on the faith of the contract.

This may happen in various ways. The party who made the misrepresentation in the first instance may have acted on the faith of the contract being valid in such a manner that a subsequent rescission would work irreparable injury to him. And here the rule applies, but with the important limitation, it seems, that he must have so acted to the knowledge of the party misled

(a) 7 Ch. 55. Cp. *Clough v. L. & N. W. Ry. Co.* *supra*, p. 481.

(b) But Wickens, V.-C. thought otherwise in the court below (12 Eq. 381) and the correctness of the reversal is doubted by Mr. Justice Lindley (2. 1458).

(c) Including assignees in bankruptcy: *Load v. Green*, 15 M. & W. 216, 15 L. J. Ex. 113; *Donaldson*

v. Farwell, 3 Otto (98 U. S.) 631.

(d) *Gresley v. Mousley*, 4 De G. & J. 78: and see cases cited in next chapter, *ad fin.*, and *Charter v. Trevelyan*, 11 Cl. & F. 714, where the parties on both sides were ultimately representatives, and as to the defendants through more than one succession.

and without protest from him, so that his conduct may be said to be induced by the other's delay in repudiating the contract. Thus where a policy of marine insurance is voidable for the non-disclosure of a material fact, but the delay of the underwriters in repudiating the insurance after they know the fact induces the assured to believe that they do not intend to dispute it, and he consequently abstains from effecting any other insurance, it would probably be held that it is then too late for the underwriters to rescind (a). Or the interest taken under the contract by the party misled may have been so dealt with that he cannot give back the same thing he received. On this principle a shareholder cannot repudiate his shares if the character and constitution of the company have in the meantime been altered. This was the case in *Clarke v. Dickson* (b), where the plaintiff had taken shares in a cost-book mining company. The company was afterwards registered under the Joint Stock Companies Act then in force, apparently for the sole purpose of being wound up. In the course of the winding up the plaintiff discovered that fraudulent misrepresentations had been made by the directors. But it was by this time impossible for him to return what he had got; for instead of shares in a going concern on the cost-book principle he had shares in a limited liability company which was being wound up (c). It was held that it was too late to repudiate the shares, and his only remedy was by an action of deceit against the directors personally responsible for the false statements (d). As Crompton, J., put it, "You cannot both eat your cake and return your cake" (e). A similar case on this point is *Western Bank of Scotland v. Addie* (f). There the company was an unincorporated joint stock banking company when the respondent took his shares in it. As in *Clarke v. Dickson*, it was afterwards incorporated and registered for the purpose of a voluntary winding up. It was held as a probable

Common
dealings
with
subject-
matter of
contract.

(a) Per Cur. *Morrison v. Universal Marine Insurance Co.* (Ex. Ch.) L. R. 8 Ex. at p. 205; cp. *Clough v. L. & N. W. Ry. Co.* (Ex. Ch.) L. R. 7 Ex. at p. 35.

(b) E. B. & E. 148, 27 L. J. Q. B. 223.

(c) The fact of the winding-up having begun before the repudiation of the shares is of itself decisive

according to the later cases under the present Companies Act: but here the point was hardly made.

(d) Which course was accordingly taken with success: *Clarke v. Dickson*, 6 C. B. N. S. 453, 28 L. J. C. P. 225.

(e) E. B. & E. at p. 152.

(f) L. R. 1 Sc. & D. 145.

Conduct
of party
misled.

opinion by Lord Chelmsford, and more positively by Lord Cranworth, that the change in the condition of the company and of its shares was such as to make restitution impossible, and therefore the contract could not be rescinded (*a*). The case is simpler where the party misled has himself chosen to deal with the subject-matter of the contract, by exercising acts of ownership or the like, in such a manner as to make restitution impossible; and it is of course still plainer if he goes on doing this with knowledge of all the facts; if the lessee of mines, for example, goes on working out the mines after he has full information of the circumstances on which he relies as entitling him to set aside the lease (*b*). So a settlement of partnership accounts cannot be disputed by one of the parties if in the meantime the concern has been completely wound up and he has taken possession of and sold the partnership assets made over to him under the arrangement (*c*); and an arrangement between a company and one of its directors which has been acted upon by the company so as to change the director's position cannot afterwards be repudiated by the company (*d*). So a purchaser cannot after taking possession maintain an action to recover back his deposit (*e*).

The right to recover back money paid under an agreement on the ground of mistake, failure of consideration, or default of the other party is also subject to the same rule. Thus a lessee who has entered into possession cannot recover back the premium paid by him on the ground of the lessor's default in executing the lease and doing repairs to be done by him under the agreement (*f*): nor can a party recover back an excessive payment after his own dealings have made it impossible to ascertain what was really due (*g*).

No re-
scission
against

C. The contract cannot be rescinded after third persons have acquired rights under it for value.

(*a*) It would seem, but it does not clearly appear, that in this case also the misrepresentations were not discovered till after the commencement of the winding-up.

(*b*) *Vigers v. Pike*, 8 Cl. & F. 562, 650.

(*c*) *Skilbeck v. Hilton*, 2 Eq. 587.

(*d*) *Sheffield Nickel Co. v. Unwin*, 2 Q. B. D. 214.

(*e*) *Blackburn v. Smith*, 2 Ex. 783, 18 L. J. Ex. 187; but it was also held that apart from this the objection came too late under the conditions of sale in the particular case.

(*f*) *Hunt v. Silk*, 5 East 449.

(*g*) *Freeman v. Jeffries*, L. R. 4 Ex. 189, 197.

The present rule is altogether, as the last one is to some extent, ^{innocent} a corollary from the main principle that a contract induced by ^{purchasers} fraud or misrepresentation is as such not void but only voidable ^{for value}. The result is that when third persons have acquired rights under the transaction in good faith and for value, those rights are indefeasible.

Thus when a sale of goods is procured by fraud, the property ^{Fraudu-} in the goods is transferred by the contract (*a*), subject as between ^{lent sales} the seller and the buyer to be re-vested by the seller exercising his option to rescind when he discovers the fraud. A purchaser in good faith from the fraudulent buyer acquires an indefeasible title (*b*). And a person who takes with notice of the fraud is a lawful possessor as against third persons, and as such is entitled to sue them for all injuries to the property, unless and until the party defrauded exercises his right of rescission (*c*).

The same rule holds good as to possession or other partial interests in property. The following curious and somewhat complex case was decided some years ago by the Judicial Committee. A. sells goods to B., but resumes the possession, by arrangement with B., as a security for the price. Afterwards B. induces A. to re-deliver possession of the goods to him by a fraudulent misrepresentation, and thereupon pledges the goods to C., who advances money upon them in good faith and in ignorance of the fraud. This pledge is valid, and C. is entitled to the possession of the goods as against A. (*d*).

It must be carefully observed that a fraudulent possessor ^{Distinc-} cannot give a better title than he has himself, even to an inno- ^{tion where} cent purchaser, if the possession has not been obtained under a ^{there is no} contract with the true owner, but by mere false pretences as to ^{contract,} some matter of fact concerning the true owner's contract with a ^{but goods} ^{are merely}

(*a*) *Load v. Green*, 15 M. & W. 216, 15 L. J. Ex. 113; where it was held that a fraudulent buyer becoming bankrupt had not the goods in his order and disposition with the consent of the true owner; for the vendors became the true owners only when they elected to rescind and demanded the goods from the assignees.

(*b*) *White v. Garden*, 10 C. B. 919, 20 L. J. C. P. 167; *Stevenson*

v. Newnham (Ex. Ch.), 13 C. B. 285, 303, 22 L. J. C. P. 110, 115.

(*c*) *Stevenson v. Newnham*, see last note.

(*d*) *Pease v. Gloaher*, L. R. 1 P. C. 219. The dealings were in fact with the bill of lading; but as this completely represented the goods for the purposes of the case, the statement in the text is simplified in order to bring out the general principle more clearly.

obtained
by fraudu-
lent pre-
tences.

third person. To put a simple case, A. sells goods to B. and desires B. to send for them. C. obtains the goods from A. by falsely representing himself as B.'s servant: now C. acquires neither property nor lawful possession, and cannot make any sale or pledge of the goods which will be valid against A., though the person advancing his money have no notice of the fraud. The result is the same if A. means to sell goods to B. & Co., and C. gets goods from A. by falsely representing himself as a member of the firm and authorized to act for them (a), or if B., a person of no credit, gets goods from A. by trading under a name and address closely resembling those of C., who is known to A. as a respectable trader (b). It is also the same in the less simple case of a third person obtaining delivery of the goods by falsely representing himself as a sub-purchaser; for here there is no contract between him and the seller which the seller can affirm or disaffirm; what the seller does is to act on the mistaken notion that the property is already his by transfer from the original buyer. This was in effect the decision of the Exchequer Chamber in *Kingsford v. Merry* (c), though the case was a little complicated by the special consideration of the effect of delivery orders or warrants as "indicia of title."

Share-
holder
can't repu-
diate after
winding-
up: *Oakes*
v. Tur-
quand.

The decision of the House of Lords in *Oakes v. Turquand* (d), which settled that a shareholder in a company cannot repudiate his shares after the commencement of a winding-up, proceeded to a considerable extent upon the language of the Companies Act 1862, in the sections defining who shall be contributories. But the broad principles of the decision, or if we prefer to say so, of the Act as interpreted by it, are these. The rights of the company's creditors are fixed at the date of the winding-up and are not to be afterwards varied. They are entitled to look for payment in the first instance to all persons who are actually members of the company at the date of the winding-up. And this class includes shareholders who were entitled as against the company to repudiate their shares on the ground of fraud but have not yet done so. For their obligations under their

(a) *Hardman v. Booth*, 1 H. & C. 808, 32 L. J. Ex. 105; *Hollins v. Fowler*, L. R. 7 H. L. 757, 795.

(b) *Cundy v. Lindsay*, in H. L., Mar. 4, 1878, affirming s. c. nom. *Lindsay v. Cundy*, 2 Q. B. D. 96.

(c) 1 H. & N. 508, 26 L. J. Ex. 88 (see per Erle J. at p. 88), revg. s. c. in court below, 11 Ex. 577, 25 L. J. Ex. 166.

(d) L. R. 2 H. L. 325.

contracts with the company, including the duty to contribute in the winding-up, were valid until rescinded, and the creditors in the winding-up must be considered as being, to the extent of their claims, purchasers for value of the company's rights against its members. They are not entitled to any different or greater rights: no shareholder can be called upon to do more than perform his contract with the company (a).

On the other hand persons who have taken any gratuitous benefit under a fraudulent transaction, though themselves ignorant of the fraud, are in no better position than the original contriver of it. Thus where a creditor was induced to give a release to a surety by a fraud practised on him by the principal debtor, of which the surety was ignorant, and the surety gave no consideration for the release, it was held that this release might be disaffirmed by the creditor on discovering the fraud. But third persons who on the faith of the release being valid had advanced money to the surety to meet other liabilities would be entitled to assert a paramount claim (b).

Persons taking as volunteers under fraudulent contract, though innocent, no better off than original defrauder.

D. The contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known (c), so long that under the circumstances of the particular case the other party may fairly infer that the right of rescission is waived.

Rescission must be within reasonable time.

It is believed that the statement of the rule in some such form as this will reconcile the substance and language of all the leading authorities. On the one hand it is often said that the election must be made within a reasonable time, while on the other hand it has several times been explained that lapse of time as such has no positive effect of its own. The Court is specially cautious

Explanation of this: the importance of time is not *per se*, but as evidence

(a) *Waterhouse v. Jamieson*, L. R. 2 Sc. & D. 29. In *Hall v. Old Talar-goch Lead Mining Co.* 3 Ch. D. 749, an action for rescission and indemnity commenced by a shareholder after a resolution for winding-up but in ignorance of it was allowed to proceed. Here however relief was claimed against the directors personally as well as the company.

(b) *Scholesfield v. Templer*, Johns. 155, 165, 4 De G. & J. 429. The Court below endeavoured to provide for the payment of the third persons

in question, Johns. 171, but the Court of Appeal varied the decree by making it simply without prejudice to their rights, 4 De G. & J. 435.

(c) Perhaps we might add "or after it might have been known with reasonable diligence": but authority, so far as it goes, and the analogy of other branches of the law where the same question arises, are in favour of considering means of knowledge as only evidence of either actual knowledge or a determination to waive all inquiry.

of acquies-
cence.
Auth. ri-
ties in
equity.

in entertaining charges of fraud or misrepresentation brought forward after a long interval of time ; it will anxiously weigh the circumstances, and consider what evidence may have been lost in consequence of the time that has elapsed (*a*). But time alone is no bar to the right of rescinding a voidable transaction ; and the House of Lords in one case set aside a purchase of a principal's estate by his agent in another name after the lapse of more than half a century, the facts having remained unknown to the principal and his representatives for thirty-seven years (*b*). In a later case the Lord Justice Turner stated expressly that "the two propositions of a bar by length of time and by acquiescence are not distinct propositions." Length of time is evidence of acquiescence, but only if there is knowledge of the facts, for a man cannot be said to have acquiesced in what he did not know (*c*). Lord Campbell slightly qualified this by adding that although it is for the party relying on acquiescence to prove the facts from which consent is to be inferred, "it is easy to conceive cases in which, from great lapse of time, such facts might and ought to be presumed" (*d*).

The rule has lately been laid down and acted upon by the Judicial Committee in this form : "In order that the remedy should be lost by laches or delay, it is, if not universally, at all events ordinarily . . . necessary that there should be sufficient knowledge of the facts constituting the title to relief" (*e*).

Acquiescence need not be manifested by any positive act ; the question is whether there is sufficient evidence either from lapse of time or from other circumstances of "a fixed, deliberate and unbiassed determination that the transaction should not be impeached" (*f*). In estimating the weight to be given to length of time as evidence of acquiescence the nature of the property

(*a*) Cp. *Bright v. Leyerton*, 2 D. F. J. 606, 617.

(*b*) *Charter v. Trevelyan*, 11 Cl. & F. 714, 740.

(*c*) *Life Association of Scotland v. Siddall*, 3 D. F. J. 58, 72, 74 : on the point that there cannot be acquiescence without knowledge, cp. *Lloyd v. Attwood*, 3 De G. & J. 614, 650 ; per Alderson, B. *Load v. Green*, 15 M. & W. at p. 217 : "A man cannot permit who does not know that he has a right to refuse ;"

and per Jessel, M. R. 1 Ch. D. 528.

(*d*) 3 D. F. J. at p. 77. The case was one not of rescinding a contract but of a breach of trust ; but the principles are the same.

(*e*) *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, 241.

(*f*) Per Turner, L. J. *Wright v. Vanderplank*, 8 D. M. G. 133, 147. The epithets, however, are more specially appropriate to the particular ground of rescission (undue influence) then before the Court.

concerned is material (*a*). And other special circumstances may prevent lapse of time even after everything is known from being evidence of acquiescence ; as when nothing is done for some years because the other party's affairs are in such a condition that proceedings against him would be fruitless (*b*).

If a party entitled to avoid a transaction has precluded himself by his own acts or acquiescence from disputing it in his lifetime, his representatives cannot come forward to dispute it afterwards (*c*).

It is said that holders of shares in companies are under a special obligation of diligence as to making their election, but the dicta relate chiefly if not wholly to objections apparent on the face of the memorandum or articles of association. With the contents of these a shareholder is bound to make himself acquainted, and must be deemed to become acquainted, when his shares are allotted (*d*). But objections which can be taken upon these must proceed on the ground, not of fraud or misrepresentation as such, but of the undertaking in which shares are allotted being substantially a different thing from that which the prospectus described and in which the applicant offered to take shares. Nor are we aware of any case in which the rule has been applied to a repudiation of shares declared before a winding up and on the ground of fraud or misrepresentation not apparent on the articles. Still it seems quite reasonable to hold that in the case of a shareholder's contract lapse of time without repudiation is of greater importance as evidence of assent than in most other cases.

Thus much of the exposition of the rule in equity. The same general principle has recently been laid down in the Exchequer Chamber. "We think the party defrauded may keep the question open so long as he does nothing to affirm the contract. . . . In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract ? or has he elected to avoid it ? or has he made no

Special
obligation
of dili-
gence in
case of
share-
holders.

Same
general
rule at
law, per
Cur. in
Ex. Ch.

(*a*) 8 D. M. G. at p. 150.

(*b*) *Scholefield v. Templer*, 4 De G. & J. 429.

(*c*) *Skottowe v. Williams*, 3 D. F. J. 535, 541.

(*d*) *Central Ry. Co. of Venezuela v. Kisch*, L. R. 2 H. L. at p. 125, *Oakes v. Turquand*, *ib.* p. 352 ; and see Ch. VIII. p. 418^{at} ve.

election? We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind. And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract, and when the lapse of time is great it probably would in practice be treated as conclusive evidence to show that he has so determined" (a).

Fixed period of limitation by Fr. law. The French law treats the right of having a contract judicially set aside for fraud, &c., as a substantive right of action, and limits a fixed period of ten years, running from the discovery of the truth, within which it must be exercised (b).

Unfounded charges of fraud discouraged: parties making them must pay costs. One or two points remain to be mentioned, which we have reserved to the last as being matter of procedure, but which depend upon general principles. Courts of justice are anxious to discover and discourage fraud in every shape, but they are no less anxious to discourage and rebuke loose or unfounded charges of fraud and personal misconduct. The facts relied on as establishing a case of fraud must be distinctly alleged and proved (c). Where such charges are made and not proved, this will not prevent the party making them from having any relief to which he may otherwise appear to be entitled, but he must pay the costs occasioned by the unfounded charges (d). And in one recent case, where the plaintiff made voluminous and elaborate charges of fraud and conspiracy which proved to be unfounded, the Court of Appeal not only made him pay the costs of that part of the case, but refused to allow him the costs even of the part on which he succeeded. It was held that he had so mixed up unfounded and reckless aspersions upon character

(a) Per Cur. *Clough v. L. & N. W. Ry. Co.* L. R. 7 Ex. at p. 34, repeated in *Morrison v. Universal Marine Insurance Co.* L. R. 8 Ex. at p. 203.

(b) Code Civ. 1304.

(c) In equity pleading a charge of fraud in general terms would not support a bill on demurrer: *Gilbert v. Lewis*, 1 D. J. S. at p. 49, per

Lord Westbury.

(d) *Hilliard v. Eiffe*, L. R. 7 H. L. 39, 51, 52; *London Chartered Bank of Australia v. Lempridre*, L. R. 4 P. C. at p. 597; *Clinch v. Financial Corporation*, 5 E. Q. at p. 483; per Lord Cairns, *Thomson v. Eastwood*, 2 App. Ca. at p. 243.

with the rest of the suit as to forfeit his title to the costs which he otherwise would have been entitled to receive (*a*).

The special jurisdiction of courts of equity to order the cancellation of an instrument obtained by fraud or misrepresentation is not affected by the probability or practical certainty that the plaintiff in equity would have a good defence to an action on the instrument, nor is it the less to be exercised even if the instrument is already in his possession. He is entitled not only not to have the contract enforced against him, but to have it judicially annulled (*b*). Independent jurisdiction of equity to cancel instruments for fraud, &c.

(*a*) *Parker v. McKenna*, 10 Ch. 96, 123, 125.

(*b*) *London and Provincial Insurance Co. v. Seymour*, 17 Eq. 85 : and see *Hoare v. Bremridge*, 8 Ch. 22, there explained and distinguished. Therefore a defendant sued on an instrument which he

alleges to be voidable may properly add to his defence a counterclaim for the cancellation of the instrument and, if the action is not in the Chancery Division, a transfer of it to the Chancery Division for that purpose.

CHAPTER XI.

DURESS AND UNDUE INFLUENCE.

Contract
voidable
if consent
not free.

If the consent of one party to a contract is obtained by the other under such circumstances that the consent is not free, the contract is voidable at the option of the party whose consent is so obtained. It is quite clear that it is not merely void (*a*). The transaction might indeed be void if the party were under actual physical constraint, as if his hand were forcibly guided to sign his name ; or perhaps if he were so prostrated by fear as not to know what he was doing (*b*) ; but this would be not because his consent was not free, but because there was no consent at all.

What then are the circumstances which are held by English courts to exclude freedom of consent ? The treatment of this question has at common law been singularly narrow and in equity singularly comprehensive.

I. *Duress at Common Law.*

The com-
mon law
doctrine of
Duress.

At common law the coercion which will be a sufficient cause for avoiding a contract may consist in *duress* or *menace* ; that is, either in actual compulsion or in the threat of it. In modern books the term *duress* is used to include both species. It is said that there must be some threatening of life or member, or of imprisonment, or some imprisonment or beating itself. Threatening to destroy or detain, or actually detaining property,

(*a*) Co. 2 Inst. 482, and 2nd resolution in *Whelpdale's ca.* 5 Rep. 119.

(*b*) Savigny, Syst. 3. 109. But the analogy of *Matthews v. Baxter*, L. R. 8 Ex. 132, is against this.

does not amount to duress (a). And this applies to agreements not under seal as well as to deeds (b). "It must be a threatening, beating, or imprisonment of the party himself that doth make the deed, or his wife" (a) or (it seems) parent or child (c). And a threat of imprisonment is not duress unless the imprisonment would be unlawful. This is illustrated by two rather curious modern cases in both of which the party's consent was determined by the fear of confinement in a lunatic asylum. In *Cumming v. Ince* (d) the plaintiff had been taken to a lunatic asylum and deprived of the title deeds of certain property claimed by her. Proceedings were commenced under a commission of lunacy, but stayed on the terms of an arrangement signed by counsel on both sides, under which the deeds were to be deposited in certain custody. The plaintiff afterwards repudiated this arrangement and brought detinue for the deeds. On an issue directed to try the right to the possession of the deeds as between herself and the other parties the Court held that in any view the defendants were wrong. For if their own proceedings under the commission were justified, they could not say the plaintiff was competent to bind herself, and if not, the agreement was obtained by the fear of a merely unlawful imprisonment and therefore voidable on the ground of duress. And it made no difference that the plaintiff's counsel was party to the arrangement. His assent must be considered as enforced by the same duress: for as her agent he might well have feared for her the same evils that she feared for herself. In *Biffin v. Bignell* (e), on the other hand, the defendant was sued for necessities supplied to his wife. She had been in a lunatic asylum under treatment for delirium tremens, and on her discharge the husband promised her 12s. a week to live apart from him, adding that if she would not he would send her to another asylum. The wife was accordingly living apart from the husband under this agreement. It was held that her consent to it was not obtained by duress, for under these circumstances "the threat, if any, was not of anything contrary to law, at least not so to be understood": consequently the presumption

(a) Shepp. Touch. 61. (d) 11 Q. B. 112, 17 L. J. Q. B. 105.
 (b) *Atlee v. Backhouse*, 3 M. & W. 633, *Skeate v. Beale*, 11 A. & E. 983. (e) 7 H. & N. 877, 31 L. J. Ex. 189.
 (c) Ro. Ab. 1. 687, pl. 5; Bac. Ab. Duress (B).

of authority to pledge the husband's credit was effectually excluded, and the plaintiff could not recover (*a*).

Money paid under circumstances of compulsion recoverable back.

The narrowness of the common law doctrines above stated is considerably mitigated in practice, for when money has been paid under circumstances of practical compulsion, though not amounting to duress, it can generally be recovered back. This is so when the payment is made to obtain the possession of property wrongfully detained (*b*); and the property need not be goods for which the owner has an immediate pressing necessity, nor need the claim of the party detaining them be manifestly groundless, to make the payment for this purpose involuntary in contemplation of law (*c*). So it is where excessive fees are taken under colour of office, though it be usual to pay them (*d*); or where an excessive charge for the performance of a duty is paid under protest (*e*). The person who actually receives the money may properly be sued, though he receive it only as an agent (*f*). The case of one creditor exacting a fraudulent preference from a debtor as the price of his assent to a composition (*g*) is to a certain extent analogous. But in all these cases the foundation of the right to recover back the money is not the involuntary character of the payment in itself, but the fact that the party receiving it did no more than he was bound to do already, or something for which it was unlawful to take money if he chose to do it, though he had his choice in the first instance. Such payments are thus regarded as made without consideration. The legal effect of their being practically involuntary, though important, comes in the second place; the circumstances explain and excuse the conduct of the party making the payment. Similarly in the kindred case of a payment under mistake the actual foundation of the right is a failure of consideration, and ignorance of material facts accounts for the payment having been made. The common principle is that if a man chooses to give

But on the ground not of coercion in itself but of failure of consideration.

(*a*) *Qu.* whether in any case he could have recovered without showing that the wife had repudiated the arrangement.

(*b*) *Wakefield v. Newbon*, 6 Q. B. 276, 280, 13 L. J. Q. B. 258.

(*c*) *Shaw v. Woodcock*, 5 B. & C. 73.

(*d*) *Dew v. Parsons*, 2 B. & Ald. 562; *Steele v. Williams*, 8 Ex. 625,

22 L. J. Ex. 225.

(*e*) *Parker v. G. W. Ry. Co.* 7 M. & Gr. 253, 292. And see other authorities collected in notes to *Marriott v. Hampton*, 2 Sm. L. C.

(*f*) *Steele v. Williams*, *supra*.

(*g*) *Atkinson v. Denby*, 6 H. & N. 778, in Ex. Ch. 7 *ib.* 984, 31 L. J. Ex. 362. *Supra*, Ch. VI., p. 331.

away his money, or to take his chance whether he is giving it away or not, he cannot afterwards change his mind ; but it is open to him to show that he supposed the facts to be otherwise or that he really had no choice. The difference between the right to recover money back under circumstances of this kind and the right to rescind a contract on the ground of coercion is further shown by this, that an excessive payment is not the less recoverable if both parties honestly supposed it to be the proper payment (a). We therefore dwell no farther on this topic, but proceed to consider the more extensive doctrines of equity.

II. *The equitable doctrine of Undue Influence.*

In equity there is no rule defining inflexibly what kind or amount of compulsion shall be sufficient ground for avoiding a transaction, whether by way of agreement or by way of gift. The question to be decided in each case is whether the party was a free and voluntary agent (b).

The equitable doctrine of Undue Influence.

Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment.

“The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed” (c). And if it is once established that a person who stands in a position of commanding influence towards another has obtained an advantage from him while in that position, it will be presumed, in the absence of rebutting proof, that the advantage was obtained by means of that influence : and it is not necessary for the party complaining to show the precise manner in which the influence was exerted. Indeed one chief object of the rules which will presently be discussed is to prevent those who unduly obtain benefits from persons under their dominion from making them-

Generality of the principle. Exercise of influence need not be proved in detail when relation of habitual influence established.

(a) *Dew v. Parsons*, 2 B. & Ald. 562.

H. L. 200, 210.

(b) *Williams v. Bayley*, L. R. 1

(c) Per Lord Kingsdown, *Smith v. Kay*, 7 H. L. C. at p. 779.

selves safe by the secrecy of the particular transaction (a). It is very possible that the circumstances would in many such cases, if they could be fully brought out, amount to proof of actual compulsion or fraud; so that it may perhaps be said that undue influence, as the term is used in courts of equity, means an influence in the nature of compulsion or fraud, the exercise of which in the particular instance to determine the will of the one party to the advantage of the other is not specifically proved, but is inferred from an existing relation of dominion on the one part and submission on the other (b). Given a position of general and habitual influence, its exercise in the particular case is presumed.

General
influence
presumed
from
certain
relations.

But again, this habitual influence may itself be presumed to exist as a natural consequence of the condition of the parties, though it be not actually proved that the one habitually acted as if under the domination of the other. There are many relations of common occurrence in life from which "the Court presumes confidence put [*i.e.* in the general course of affairs] and influence exerted" [*i.e.* in the particular transaction complained of] (c).

Persons may therefore not only be proved by direct evidence of conduct, but presumed by reason of standing in any of these suspected relations, as they may be called, to be in a position of commanding influence over those from whom they take a benefit. In either case they are called upon to rebut the presumption that the particular benefit was procured by the exertion of that influence, and was not given with due freedom and deliberation. They must "take upon themselves the whole proof that the thing is righteous" (d). We shall here observe that this, like several other of the peculiar rules of equity, is not a rule of substantive law but a rule of evidence. The distinction is well shown in the arrangement of the Anglo-Indian codes.

(a) See *Dent v. Bennett*, 4 My. & Cr. at p. 277.

(b) In *Boyse v. Rossborough*, 6 H. L. C. at p. 48, it is said that, taking the words in a wide sense, all undue influence may be resolved into coercion and fraud: but the case there considered is that of a will, in which undue influence has a more restricted meaning than in transactions *inter vivos*: see note (c),

p. 526, *infra*.

(c) Per Lord Kingsdown, *Smith v. Kay*, 7 H. L. C. 750, 779.

(d) *Gibson v. Jeyes*, 6 Ves. 266, 276. The like burden of proof is cast upon those who take any benefit under a will which they have themselves been instrumental in preparing or obtaining: *Fulton v. Andrew*, L. R. 7 H. L. 448, 472.

We find the rule of law laid down in the Contract Act (see Appendix H at end of this chapter). But the rule of evidence properly finds its place, not here, but in the Evidence Act (I. of 1872, s. 111):—

“Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.”

“Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed” (a).

“Nothing can be more important to maintain” (it has been recently said) “than the jurisdiction, long asserted and upheld by the Court, in watching over and protecting those who are placed in a situation to require protection as against acts of those who have influence over them, by which acts the person having such influence obtains any benefit to himself. In such cases the Court has always regarded the transaction with jealousy” (b) — a jealousy almost invincible, in Lord Eldon’s words (c).

“In equity persons standing in certain relations to one another, such as parent and child (d), man and wife (e), doctor and patient (f),

(a) Per Lord Chelmsford, *Tate v. Williamson*, 2 Ch. 55, 61.

(b) Per Lord Hatherley, *Turner v. Collins*, 7 Ch. 329, 338.

(c) *Hatch v. Hatch*, 9 Ves. at p. 296.

(d) *Archer v. Hudson*, 7 Beav. 551; *Turner v. Collins*, 7 Ch. 329.

(e) Lord Hardwicke’s remarks in *Grigby v. Cox*, 1 Ves. sen. 517 (though not the decision, for it was not a gift but a purchase, and apparently there was no evidence to bear out the charge of collusion) and the decision in *Nedby v. Nedby*, 5 De G. & Sm. 377, seem *contra*; but see *Cobbett v. Brock*, 20 Beav. 524; *Page v. Horne*, 11 Beav. 227; showing

that there is a fiduciary relation between persons engaged to be married; and *Coulson v. Allison* 2 D. F. J. 521, 524, the like as to persons living together as man and wife though not lawfully married. In all these cases the burden of proof was held to be on the man (as holding under such circumstances a position of influence) to support the transaction. It may not be so however in a case of mere illicit intercourse: see *Farmer v. Farmer*, 1 H. L. C. 724, 752.

(f) *Dent v. Bennett*, 4 My. & Cr. 269; *Ahearne v. Hogan*, Dru. 310; s.r. *Blackie v. Clark*, 15 Beav. at p. 603.

attorney and client (a), confessor and penitent, guardian and ward (b), are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burthen of proving that the transaction was fairly conducted as if between strangers, that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence" (c).

Rules in
Hunter v.
Atkins.

Lord Brougham in *Hunter v. Atkins* (d) made the following distinctions between the various kinds of relations as affecting the burden of proof in respect of the validity of the act.

(A). If it is not shown that special confidence was reposed in the person taking the benefit, specific proof is required of incapacity, fraud, [or compulsion] vitiating the particular transaction.

(B). If a confidential relation is proved (not being one of those next mentioned) proof is required of circumstances making it likely that some advantage was taken of such relation [though not of the precise circumstances under which the act impeached took place].

(C). But if the party taking the benefit stands towards the other "in any of the known relations of guardian and ward, attorney and client, trustee and cestui que trust, &c. [this &c. is important, as will immediately appear] then in order to support the [act] he ought to show that no such advantage was taken . . . the proof lies upon him that he has dealt with the other party, the client, ward, &c., exactly as a stranger would have done."

If it is asked, what are the classes of persons who fall within this last description, the answer is that as the Court of Chancery

(a) *Gibson v. Jeyes*, 6 Ves. 266; *Holman v. Loynes*, 4 D. M. G. 270; *Gresley v. Mousley*, 4 De G. & J. 78, 94.

(b) *Hatch v. Hatch*, 9 Ves. 292; *Maitland v. Irving*, 15 Sim. 437.

(c) Per Lord Penzance, *Parfitt v. Lawless*, L. R. 2 P. & D. 462, 468. It is to be noted that this does not apply to wills, as to which undue influence is never presumed: *ib.*; *Boyse v. Rossborough*, 6 H. L. C. 2, 49; *Hindson v. Weatherill*, 5 D.M.G.

301, 311, 313: though a disposition by will may be set aside as well as an act *inter vivos* when undue influence is actually proved: but then, it seems, the influence must be such as to "overpower the volition without convincing the judgment:" *Hall v. Hall*, L. R. 1 P. & D. 482. See *Walker v. Smith*, 29 Beav. 394, where between the same parties gifts by will were supported and a gift *inter vivos* set aside.

(d) 3 My. & K. 113, 134.

has never ventured to define fraud (a), so it has refused to commit itself to any enumeration of the description of persons against whom the jurisdiction now in question ought to be most freely exercised. The cases in which it has been actually exercised are considered as merely instances of the application of a principle "applying to all the variety of relations in which dominion may be exercised by one person over another" (b). Therefore Lord Brougham's distinction between the cases in which influence must be proved, and those in which it is presumed, affords no certain guide: the &c. of his enumeration is a term of indefinite extent. At most it can be said that as to certain well-known relations the Court is now bound by authority to presume influence, and that as to any other relation which the Court judges to be of a confidential kind it is free to presume that an influence founded on the confidence exists, or to require such proof thereof as it may think fit.

Another general proposition of much importance was laid down by Lord Romilly in *Cooke v. Lamotte* (c), and again soon afterwards in *Hoghton v. Hoghton* (d) which, if it could be relied on to its full extent, would considerably modify the doctrine of *Hunter v. Atkins*. This proposition is in substance as follows.

Wider rule
in Hogh-
ton v.
Hoghton;
qu. how
far tenable.

In every case where "one person obtains, by voluntary donation, a large pecuniary benefit from another," the person taking the benefit is bound to show "that the donor voluntarily and deliberately performed the act, knowing its nature and effect."

For this purpose a voluntary donation means any transaction in which one person confers a large pecuniary benefit on another, though it may be in form a contract (e); and the rule is said to obtain whether there is any confidential relation or not. And

(a) 10 Ves. 306; 1 D. M. G. 691.

(b) Sir S. Romilly, *arg. Huguenin v. Baseley*, 14 Ves. 285, adopted by Lord Cottenham, *Dent v. Bennett*, 4 My. & Cr. 269, 277; *Billage v. Southee*, 9 Ha. 534, 540. Cp. D'Aguesseau (*Œuvres*, 1. 299) "Parce que la raison de l'ordonnance est générale, et qu'elle comprend également tous ceux qui peuvent avoir quelque empire sur l'esprit des

donateurs, vos arrêts en ont étendu la disposition aux maîtres, aux médecins, aux confesseurs."

(c) 15 Beav. 234, 240.

(d) 15 Beav. 275, 298; the most important passage of the judgment is also set out in the notes to *Huguenin v. Baseley*, 2 Wh. & T. L. C.

(e) *E. G. Cooke v. Lamotte*, 15 Beav. 234; *Dent v. Bennett*, 4 My. & Cr. 269, 273.

further, if the case is one of those in which "the Court, from the relations existing between the parties to the transaction, infers the probability of undue influence having been exerted," the presumption thus raised has to be rebutted by proving, not only "that the person likely to be so influenced fully understood the act he was performing, but also that his consent to perform that act was not obtained by reason of the influence possessed by the person receiving the benefit."

There is also a recent dictum of Lord Hatherley in favour of this extended doctrine: "It is clear that any one taking any advantage under a voluntary deed, and setting it up against the donor, must show that he thoroughly understood what he was doing, or, at all events, was protected by independent advice" (a).

It is nevertheless very doubtful whether these wide statements, which (except, perhaps, as to *Cooke v. Lamotte*) go beyond what was required for the decisions that gave occasion for them, can be accepted as law. They have not been contradicted in any reported case, but the present writer has reason to know that they cannot be relied on in practice. Carried to their full extent, they would make an irrevocable gift almost impossible. No man could confer a boon with grace or enjoy it without misgiving.

It has been suggested in the Irish Court of Chancery that if *Hunter v. Atkins* goes too far in one direction, *Cooke v. Lamotte* and *Hoghton v. Hoghton* go too far in the other, and it may finally be established that the true rule lies between these (b). The supposed middle course would however be difficult to define.

Burden
of proof
where no
special
relation.

At all events, in the absence of any special relation from which influence is presumed, and when it is shown that the grantor fully understood the effect of his act, the burden of proof is on the person impeaching the transaction (c), and he must show affirmatively that pressure or undue influence was employed.

(a) *Phillips v. Mullings*, 7 Ch. at p. 246.

(b) *Kirwan v. Cullen*, 4 Ir. Ch. 322, 328.

(c) *Blackie v. Clark*, 15 Beav. 595; *Toker v. Toker*, 31 Beav. 629, 3 D. J. S. 487.

Having thus stated the fundamental rules, we may proceed to say something more of

Auxiliary
rules and
doctrines
on special
points.

(1) The auxiliary rules applied by courts of equity to voluntary gifts in general :

(2) The like as to the influence presumed from special relations, and the evidence required in order to rebut such presumption :

(3) What are the continuing relations between the parties from which influence has been presumed :

(4) From what circumstances, apart from any continuing relation, undue influence has been inferred : and herein of the doctrine of equity as to sales at an undervalue and "catching bargains" :

(5) The limits of the right of rescission.

1. As to voluntary dispositions in general. (Cp. Dav. Conv. 3. pt. 1. Appx. No. 4.)

Voluntary
disposi-
tions
generally.

A voluntary settlement which deprives the settlor of the immediate control of the property dealt with, though it be made not for the benefit of any particular donee, but for the benefit of the settlor's children or family generally, and free from any suspicion of unfair motive, is not in a much better position than an absolute and immediate gift. It seems indeed doubtful whether the Court does not consider it improvident to make in general indefinite contemplation of marriage the same kind of settlement which in contemplation and consideration of a definitely intended marriage it is thought improvident not to make (a).

It is conceived that the ground on which such dispositions are readily set aside at the instance of the settlor's representatives is not the imprudence of the thing alone, but an inference from that, coupled with other circumstances—such as the age, sex, and capacity of the settlor—that the effect of the act cannot have been really considered and understood at the time when it was done (b).

(a) *Everitt v. Everitt*, 10 Eq. 405 : but here some of the usual provisions were omitted.

(b) *Ib.* ; *Prideaux v. Lonsdale*, 1 D. J. S. 433. So common ignorance

or mistake of both parties as to the effect of an instrument may sometimes be inferred on the face of it from its unreasonable or unusual character : see p. 435 *supra*.

As to
power of
revocation.

The absence of a power of revocation has often been insisted upon as a mark of improvidence in a voluntary settlement; and it has been even held to be in itself an almost fatal objection: but the doctrine now settled by the Court of Appeal is that it is not conclusive, but is only to be taken into account as matter of evidence, and is of more or less weight according to the other circumstances of each case (*a*).

It was a rule of Chancery practice that a voluntary settlement could not be set aside at the suit of a defendant. The person impeaching it had to do so by a substantive proceeding in either an original or a cross suit (*b*). Under the new practice he will proceed by counter-claim if sued on the deed.

Special
relations.

2. Auxiliary rules as to the influence presumed from special relations.

Age &c.
not
material.

The principle on which the Court acts in such cases is not affected either by the age or capacity of the person conferring the benefit, or by the nature of the benefit conferred (*c*).

“Where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it:” it will not be considered as determined whilst the influence derived from it can reasonably be supposed to remain (*c*).

Influence
presumed
to con-
tinue.

Where the influence has its inception in the legal authority of a parent or guardian, it is presumed to continue for some time after the termination of the legal authority, until there is what may be called a complete emancipation, so that a free and unfettered judgment may be formed, independent of any sort of control (*d*). It is sufficiently obvious that without this extension the rule would be practically meaningless. It is said that as a general rule a year should elapse from the termination of the authority before the judgment can be supposed to be wholly emancipated: this of course does not exclude actual proof of undue influence at any subsequent time (*e*). With regard to the

Evidence

(*a*) *Hall v. Hall*, 8 Ch. 430, where the former cases are reviewed.

(*b*) *Way's tr.* 2 D. J. S. 365, 372; *Hall v. Hall*, 14 Eq. 365, 377.

(*c*) Per Turner, L. J. *Rhodes v. Bate*, 1 Ch. 252, 257, 260; *Holman*

v. Loynes, 4 D. M. G. 270, 283.

(*d*) *Archer v. Hudson*, 7 Beav. 551, 560; *Wright v. Vanderplank*, 8 D. M. G. 133, 137, 146.

(*e*) See per Lord Cranworth, 7 H. L. C. at p. 772.

evidence to be adduced to rebut the presumption in a transaction between a father and a son who has recently attained majority, the father is bound "to show at all events that the son was really a free agent, that he had adequate independent advice . . . that he perfectly understood the nature and extent of the sacrifice he was making, and that he was desirous of making it."

required
to rebut
presump-
tion of
influence.
Father
and son.

"So again, where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect his client's interest as he would have done in the case of a client dealing with a stranger" (a).

Solicitor
and client.

He must give all the reasonable advice against himself that he would have given against a third person (b).

The result of the decisions has been thus summed up by the Judicial Committee of the Privy Council. "The Court does not hold that an attorney is incapable of purchasing from his client; but watches such a transaction with jealousy, and throws on the attorney the onus of showing that the bargain is, speaking generally, as good as any that could have been obtained by due diligence from any other purchaser" (c). He is not absolutely bound to insist on the intervention of another professional adviser. But if he does not, he must not be surprised at the transaction being disputed, and may have to pay his own costs even if in the result it is upheld.

"The broad principle on which the Court acts in cases of this description is that, wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting him, the Court will not allow any transaction between the parties

Fiduciary
relations
generally.

(a) *Savery v. King*, 5 H. L. C. at p. 655. *Casborne v. Bursham*, 2 Beav. 76, seems not quite consistent with this, but there the plaintiff was not the client himself, but his assignee in insolvency, and the client's own evidence was rather favourable to the solicitor.

(b) *Gibson v. Jeyes*, 6 Ves. 266, 278. As to solicitor's charges see

Lyddon v. Moss, 4 De G. & J. 104.

(c) *Pisani v. A.-G. for Gibraltar*, L. R. 5 P. C. 516, 536, 540. According to the recent case of *Morgan v. Minett*, 6 Ch. D. 638, there is a still more stringent rule as to gifts—an absolute rule of law "that while the relation of solicitor and client subsists the solicitor cannot take a gift from his client." *Sed qu.*

to stand unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him" (a).

In other words, every contract entered into by persons standing in such a relation is treated as being *uberrimae fidei*, and may be vitiated by silence as to matters which one of two independent parties making a similar contract would be in no way bound to communicate to the other; nor does it matter whether the omission is deliberate, or proceeds from mere error of judgment or inadvertence (b).

Thus a medical attendant who makes with his patient a contract in any way depending on the length of the patient's life is bound not to keep to himself any knowledge he may have professionally acquired, whether by forming his own opinion or by consulting with other practitioners, as to the probable duration of the life (c). Perhaps the only safe way, and certainly the best, is to avoid such contracts altogether.

In *Grosvenor v. Sherratt* (d), where a mining lease had been granted by a young lady to her brother-in-law (the son of her father's executor) and uncle, at the inducement of the said executor, "in whom she placed the greatest confidence," it was held that it was not enough for the lessees to show that the terms of the lease were fair; they ought to have shown that no better terms could possibly have been obtained; and as they failed to do this, the lease was set aside (e).

This comes very near to the case of an agent dealing on his own account with his principal, when "it must be proved that full information has been imparted, and that the agreement has been entered into with perfect good faith" (b). Nor is the agent's duty altered though the proposal originally came from

(a) Per Page Wood, V.-C. *Tate v. Williamson*, 1 Eq. at p. 536.

(b) *Molony v. Kernan*, 2 Dr. & W. at p. 39.

(c) *Popham v. Brooke*, 5 Russ. 8.

(d) 28 Beav. 659, 663.

(e) This is an extreme case. The Indian Contract Act, s. 16 (see Appendix to this chapter) does not seem to go so far. It does make it the duty of a contracting party in

loco parentis to the other to disclose all material facts: "A. sells by auction to B. a horse which A. knows to be unsound. A. says nothing to B. about the horse's unsoundness. This is not fraud in A." (s. 17, illust. a): but if "B. is A.'s daughter and is just come of age, here the relation of the parties would make it A.'s duty to tell B. if the horse is unsound" (ib. illust. b).

the principal, and the principal shows himself anxious to complete the transaction as it stands (*a*). The same rules apply to an executor who himself becomes the purchaser of part of his testator's estate (*b*). But this obligation of agents and trustees for sale appears (as we have already considered it, p. 252 above) to be incidental to the special nature of their employment, and to be a duty founded on contract rather than one imposed by any rule of law which guards the freedom of contracting parties in general.

The duty cast upon a solicitor, or other person in a like position of confidence, who deals on his own account with his client, of disclosing all material circumstances within his knowledge, does not however bind him to communicate a "speculative and consequential" possibility which may affect the future value of the subject-matter of the transaction, but which is not more in his own knowledge than in the client's (*c*).

It must not be forgotten that the suspicion with which dealings between parents and children presumably still under parental influence are regarded by courts of equity is to a certain extent counteracted by the favour with which dispositions of the kind known as family arrangements are treated. In many cases a balance has to be struck between these partly conflicting presumptions. "Transactions between parent and child may proceed upon arrangements between them for the settlement of property, or of their rights in property in which they are interested. In such cases this Court regards the transactions with favour. It does not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction (*d*). On the other hand, the transaction may be one of bounty from the child to the parent, soon after the child has attained twenty-one. In such cases this Court views the transaction with jealousy, and

Family
arrange-
ments ex-
ceptionally
favoured.

(*a*) *Dally v. Wonham*, 33 Beav. 154.

(*b*) *Baker v. Read*, 18 Beav. 398; where however relief was refused on the ground of 17 years' delay.

(*c*) *Edwards v. Meyrick*, 2 Ha. 60, 74; *Holman v. Loyne*, 4 D. M. G. at p. 280.

(*d*) Perhaps it is safer to say that

the "almost invincible jealousy" of the Court is reduced to "a reasonable degree of jealousy:" cp. Lord Eldon's language in *Hatch v. Hatch*, 19 Ves. at p. 296, and *Tweddell v. Tweddell*, Turn. & R. at p. 18. On the question of consideration see *Williams v. Williams*, 2 Ch. 294, 304.

anxiously interposes its protection to guard the child from the exercise of parental influence" (a).

It must be observed that the rules concerning gifts, or transactions in the form of contract which are substantially gifts, from a son to a father, do not apply to the converse case of a gift from an ancestor to a descendant: there is no presumption against the validity of such a gift, for it may be made in discharge of the necessary duty of providing for descendants (b).

Relations
from which
influence
presumed.

3. Relations between the parties from which influence has been presumed.

It would be useless to attempt an exact classification of that which the Court refuses on principle to define or classify; but it may be convenient to follow an order of approximate analogy to the cases of well-known relations in which the presumption is fully established.

Cases
analogous
to parent
and child.

A. Relations in which there is a power analogous to that of parent or guardian.

Uncle *in loco parentis* and niece: *Archer v. Hudson*, 7 Beav. 551; *Maitland v. Irving*, 15 Sim. 437. Step-father *in loco parentis* and step-daughter: *Kempson v. Ashbee*, 10 Ch. 15; *Espey v. Lake*, 10 Ha. 260. Executor of a will (apparently in a like position) and the testator's daughter: *Grosvenor v. Sherratt*, 28 Beav. 659.

Husband of a minor's sister with whom the minor had lived for some time before he came of age: *Griffin v. Deveuille*, 3 P. Wms. 131, n.

Two sisters living together, of whom one was in all respects the head of the house, and might be considered as *in loco parentis* towards the other, though the other was of mature years: *Harvey v. Mount*, 8 Beav. 439. Brother and sister, where the sister at the age of 46 executed a voluntary settlement

(a) *Baker v. Bradley*, 7 D. M. G. 597, 620. See also *Wallace v. Wallace*, 2 Dr. & W. 452, 470; *Bellamy v. Sabine*, 2 Ph. 425, 439; *Hoghton v. Hoghton*, 15 Beav. 278, 300; and on the doctrine of family arrangement not applying when a son without consideration gives up valuable rights to his father, *Savery*

v. King, 5 H. L. C. at p. 657. A sale by a nephew to his [great] uncle of his reversionary interest in an estate of which the uncle is tenant for life is not a family arrangement: *Talbot v. Staniforth*, 1 J. & H. 484, 501.

(b) *Beanland v. Bradley*, 2 De G. & Sm. 339.

under the brother's advice and for his benefit: *Sharp v. Leach*, 31 Beav. 491.

Husband and wife on the one part, and aged and infirm aunt of the wife on the other: *Griffiths v. Robins*, 3 Mad. 191.

Distant relationship by marriage: the donor old, infirm, and his soundness of mind doubtful; great general confidence in the donee, who was treated by him as a son: *Steed v. Calley*, 1 Kee. 620. This rather than the donor's insanity seems the true ground of the case, see p. 644.

Keeper of lunatic asylum and recovered patient: *Wright v. Proud*, 13 Ves. 136.

There are also cases of general control obtained by one person over another without any tie of relationship or lawful authority: *Bridgman v. Green*, 2 Ves. Sr. 627, Wilm. 58, where a servant obtained complete control over a master of weak understanding; *Kay v. Smith*, 21 Beav. 522, affirmed nom. *Smith v. Kay*, 7 H. L. C. 750, where an older man living with a minor in a joint course of extravagance induced him immediately on his coming of age to execute securities for bills previously accepted by him to meet the joint expenses.

In *Lloyd v. Clark*, 6 Beav. 309, the influence of an officer over his junior in the same regiment was taken into account as increasing the weight of other suspicious circumstances; but there is nothing in the case to warrant including the position of a superior officer in the general category of "suspected relations."

B. Positions analogous to that of solicitor.

Certificated conveyancer acting as professional adviser: *Rhodes v. Bate*, 1 Ch. 252. Counsel and confidential adviser: *Broun v. Kennedy*, 33 Beav. 133, 148, 4 D. J. S. 217.

Cases
analogous
to solicitor
and client.

Confidential agent substituted for solicitors in general management of affairs: *Huguenin v. Baseley*, 14 Ves. 273 (a).

(a) *A fortiori*, where characters of steward and attorney are combined: *Harris v. Tremenheere*, 15 Ves. 34. A flagrant case is *Baker v. Loader*, 16 Eq. 49. As to a land agent purchasing or taking a lease from his principal, see also *Molony v. Kernan*, 2 Dr. & W. 31; *Lord Selsey*

v. Rhoades, 2 Sim. & St. 41, 1 Bligh 1. In *Rossiter v. Walsh*, 4 Dr. and W. 485, where the transaction was between an agent and a sub-agent of the same principals, the case was put by the bill (p. 487), but not decided, on the ground of fiduciary relation. See p. 582 above.

A person deputed by an elder relation, to whom a young man applied for advice and assistance in pecuniary difficulties, to ascertain the state of his affairs and advise on relieving him from his debts : *Tate v. Williamson*, 1 Eq. 528, 2 Ch. 55.

The relation of a medical attendant and his patient is treated as a confidential relation analogous to that between solicitor and client ; *Dent v. Bennett*, 4 My. & Cr. 269 ; *Billage v. Southee*, 9 Ha. 534 ; *Ahearne v. Hogan*, Dru. 310 ; though in *Blackie v. Clark*, 15 Beav. 595, 603, somewhat less weight appears to be attached to it. It does not appear in the last case whether the existence of " anything like undue persuasion or coercion " (p. 604) was merely *not proved* or positively *disproved* : on the supposition that it was *disproved* there would be no inconsistency with the other authorities. For another unsuccessful attempt to set aside a gift to a medical attendant see *Pratt v. Barker*, 1 Sim. 1, 4 Russ. 507 ; there the donor was advised by his own solicitor, who gave positive evidence that the act was free and deliberate.

Spiritual
influence:
mixed
character
of the
cases.

c. Spiritual influence.

It is said that influence would be presumed as between a clergyman or any person in the habit of imparting religious instruction and another person placing confidence in him : *Dent v. Bennett*, 7 Sim. at p. 546. There have been two remarkable modern cases of spiritual influence in which there were claims to spiritual power and extraordinary gifts on the one side, and implicit belief in such claims on the other ; it was not necessary to rely merely on the presumption of influence resulting therefrom, for the evidence which proved the relation of spiritual confidence also went far to prove as a fact in each case that a general influence and control did actually result : *Nottidge v. Prince*, 2 Giff. 246 ; *Lyon v. Home*, 6 Eq. 655 (a). In the former case at all events there was gross imposture, but the spiritual dominion alone would have been sufficient ground to set aside the gift : for the Court considered the influence of a minister of religion over a person under his direct spiritual charge to be stronger than that arising from any other relation (b). There

(a) In *Lyon v. Home* the evidence appears to have been in a very unsatisfactory condition, and on many particulars to have led to no definite

conclusion : the case is therefore more curious than instructive.

(b) 2 Giff. 269, 270.

seems to have been also in *Norton v. Relly*, 2 Eden 286, the earliest reported case of this class, a considerable admixture of actual fraud and imposition.

The authority of *Huguenin v. Baseley*, 14 Ves. 273, as to this particular kind of influence, is to be found not in the judgment, which proceeds on the ground of confidential agency, but in Sir S. Romilly's argument in reply, to which repeated judicial approval has given a weight scarcely if at all inferior to that of the decision itself.

It may perhaps be conveniently observed in this place that Trustees have no business to make themselves partisans as between their cestuis que trust in case of differences arising: and if they put any pressure on one cestui que trust to make him concede advantages to others, though without obtaining any personal benefit for themselves, they are considered to have committed a breach of trust and are liable to pay the costs of setting aside the arrangement (a). Trustees and cestuis que trust.

The semi-judicial arguments of D'Aguesseau which have been cited on this head in our courts (*Œuvres d'Aguesseau*, 1. 284, 5. 514; 6 Eq. 671), were both in testamentary cases, and rested partly on the policy of the French law being unfavourable to charitable bequests generally, as "inofficious" towards the natural successors: the following passage from the case of the *Religieuses du Saint-Sacrement* (vol. 1. p. 295) puts this in a striking light:—

"Ces dispositions universelles, contraires aux droits du sang et de la nature, qui tendent à frustrer les héritiers d'une succession légitime, sont en elles-mêmes peu favorables; non que ce seul moyen soit peut-être suffisant pour anéantir un tel legs: mais lorsqu'il est soutenu par les circonstances du fait . . . lorsque la donation est immense, qu'elle est excessive, qu'elle renferme toute la succession . . . dans toutes ces circonstances la justice s'est toujours élevée contre ces actes odieux; elle a pris les héritiers sous sa protection; elle a cassé ces donations inofficieuses, excessives et contraires à l'utilité publique."

We have seen that in England, on the contrary, it is much more difficult to dispute a bequest than a gift *inter vivos*. The analogy of these cases is therefore to be used with caution.

4. Circumstances held to amount to proof of undue influence, Undue influence apart from any continuing relation.

(a) *Ellis v. Barker*, 7 Ch. 104.

without
fiduciary
relation.
Securities
obtained
by pres-
sure :
Williams
v. Bayley.

In a case where a father gave security for the amount of certain notes believed to have been forged by his son, the holders giving him to understand that otherwise the son would be prosecuted for the felony, the agreement was set aside, as well on the ground that the father acted under undue pressure and was not a free and voluntary agent, as because the agreement was in itself illegal as being substantially an agreement to stifle a criminal prosecution (a).

In *Ellis v. Barker* (b) the plaintiff's interest under a will was practically dependent as to part of its value on his being accepted as tenant of a farm the testator had occupied as yearly tenant. One of the trustees was the landlord's steward, and in order to induce the plaintiff to carry out the testator's supposed intentions of providing for the rest of the family he persuaded the landlord not to accept the plaintiff as his tenant unless he would make such an arrangement with the rest of the family as the trustees thought right. Under this pressure the arrangement was executed : it was practically a gift, as there was no real question as to the rights of the parties. Afterwards the deeds by which it was made were set aside at the suit of the plaintiff, and the trustees had to pay the costs.

These are the most distinct cases we have met with of a transaction being set aside on the ground of undue influence specifically proved to have been used to procure the party's consent to that particular transaction (c).

Smith v.
Kay.

In *Smith v. Kay* (d) a young man completely under the influence and control of another person and acting under that influence had been induced to execute securities for bills which he had accepted during his minority without any independent legal advice ; and the securities were set aside. There was in this case evidence of actual fraud ; but it was distinctly affirmed that the decision would have been the same without it, it being incumbent on persons claiming under the securities to give satisfactory evidence of fair dealing (e).

(a) *Williams v. Bayley*, L. R. 1 H. L. 200 ; cp. p. 290 above.

(b) 7 Oh. 104.

(c) Cp. *Ormes v. Beadel*, 2 Giff. 166, revd. 2 D. F. J. 333, on the ground that the agreement had afterwards been voluntarily acted upon

with a knowledge of all the facts.

(d) 7 H. L. C. 750.

(e) Pp. 761, 770. The securities given were for an amount very much exceeding the whole of the sums really advanced and the interest upon them : p. 778.

This comes very near to the peculiar class of cases on "catching bargains" with which we shall deal presently.

Undue influence may be inferred when the benefit is such as the taker has no right to demand [*i.e.* no natural or moral claim] and the grantor no rational motive to give (*a*). Other circumstances from which undue influence is inferred.

Inadequacy of the consideration, though in itself not decisive, may be an important element in the conclusion arrived at by a court of equity with respect to a contract of sale. As to undervalue.

The general rule of equity in this matter has been thus stated by Lord Westbury: "It is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition" (*b*). General rule: undervalue has of itself no effect.

The established doctrine is that mere inadequacy of price is in itself of no more weight in equity than at law (*c*). It is evidence of fraud, but standing alone, by no means conclusive evidence (*d*). Even when coupled with an incorrect statement of the consideration it will not alone be enough to vitiate a sale in the absence of any fiduciary relation between the parties (*e*).

But if there are other circumstances tending to show that the vendor was not a free and reasonable agent, the fact of the sale having been at an undervalue may be a material element in determining the Court to set it aside. Thus it is when one member of a testator's family conveys his interest in the estate to others for an inadequate consideration, and it is doubtful, or But coupled with other circumstances may be material as evidence that consent, or

(*a*) *Purcell v. Macnamara*, 14 Ves. 91, 115.

(*b*) *Tennent v. Tennents*, L. R. 2 Sc. & D. 6, 9. For a modern instance of such a conclusion being actually drawn by the Court from a sale at a gross undervalue, see *Rice v. Gordon*, 11, Beav. 265, 270: *cp. Underhill v. Horwood*, 10 Ves. at p. 219; *Summers v. Griffiths*, 35 Beav. 27, 33, and the earlier dictum there referred to of Lord Thurlow in *Gwynne v. Heaton* (1 Bro. C. C. 1, 9) that "to set aside a conveyance

there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it."

(*c*) *Wood v. Abrey*, 8 Mad. 417, 423; *Peacock v. Evans*, 16 Ves. 512, 517; *Stilwell v. Wilkins*, Jac. 280, 282.

(*d*) *Cockell v. Taylor*, 15 Beav. 105, 115.

(*e*) *Harrison v. Guest*, 6 D. M. G. 424, 8 H. L. C. 481.

freedom of consent, was wanting. ful if he fully understood the extent of his rights or the effect of his act (a). If property is bought at an inadequate price from an uneducated man of weak mind (b) or in his last illness (c), who is not protected by independent advice, the burden of proof is on the purchaser to show that the vendor made the bargain deliberately and with knowledge of all the circumstances. Nay more, when the vendor is infirm and illiterate and employs no separate solicitor, "it lies on the purchaser to show affirmatively that the price he has given is the value," and if he cannot do this the sale will be set aside at the suit of the vendor (d). And a late case in the Court of Appeal was decided on the ground that "if a solicitor and mortgagee...obtains a conveyance [of the mortgaged property] from the mortgagor, and the mortgagor is a man in humble circumstances without any legal advice, then the onus of justifying the transaction, and showing that it was a right and fair transaction, is thrown upon the mortgagee" (e).

Similarly if a purchase is made at an inadequate price from vendors in great distress, and without any professional assistance but that of the purchaser's attorney, "these circumstances are evidence that in this purchase advantage was taken of the distress of the vendors," and the conveyance will be set aside (f).

Equality between the contracting parties."

It has even been said that to sustain a contract of sale in equity "a reasonable degree of equality between the contracting parties" is required (g). But such a dictum can be accepted only to this extent: that when there is a very marked inequality between the parties in social position or intelligence, or the transaction arises out of the necessities of one of them and is of such a nature as to put him to some extent in the power of the other, a Court of Equity will be inclined to give much more

(a) *Sturge v. Sturge*, 12 Beav. 229; cp. *Dunnage v. White*, 1 Swanst. 137, 150.

(b) *Longmate v. Ledger*, 2 Giff. 157, 163 (affirmed on appeal, see 4 D. F. J. 402.)

(c) *Clark v. Malpas*, 31 Beav. 80, 4 D. F. J. 401.

(d) *Baker v. Monk*, 33 Beav. 419, 4 D. J. S. 388, 391.

(e) Lord Hatherley, *C. Pross v. Coke*, 6 Ch. 646, 649: though in

general there is no rule against a mortgagee buying from his mortgagor; *Knight v. Marjoribanks*, 2 Mac. & G. 10: and see *Ford v. Olden*, 3 Eq. 461.

(f) *Wood v. Abrey*, 3 Mad. 417, 424.

(g) *Longmate v. Ledger*, 2 Giff. at p. 163, by Stuart, V.-C.: cp. the same judge's remarks in *Barrett v. Hartley*, 2 Eq. at p. 794.

weight to any suspicious circumstances attending the formation of the contract, and will be much more exacting in its demands for a satisfactory explanation of them, than when the parties are on such a footing as to be presumably of equal competence to understand and protect their respective interests in the matter in hand. Compare the more guarded statement in *Wood v. Abrey* (a): "A Court of Equity will inquire whether the parties really did meet on equal terms; and if it be found that the vendor was in distressed circumstances, and that advantage was taken of that distress, it will avoid the contract." The true doctrine is well expressed in the Indian Contract Act, s. 25, expl. 2. "An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given." A sale made by a person of inferior station, and for an inadequate price, was upheld by the Court of Appeal in Chancery, and ultimately by the House of Lords, when it appeared by the evidence that the vendor had entered into the transaction deliberately, and had deliberately chosen not to take independent professional advice (b).

It is not so clear however that a degree of inadequacy of consideration which does not amount to evidence of fraud, &c. such as to be a ground for avoiding the contract may not yet be a sufficient ground for refusing specific performance. The general rule as to granting specific performance, so far as it bears on this point, is that the Court has a discretion not to direct a specific performance in cases where it would be highly unreasonable to do so: it is also said that one cannot define beforehand what shall be considered unreasonable (c). On principle it might perhaps be doubted whether it should ever be considered unreasonable to make a man perform that which he has the present means of performing, and which with his eyes open he has bound himself to perform by a contract valid in

Can specific performance be refused on the ground of undervalue alone?

(a) 3 Mad. at. p. 423.

(b) *Harrison v. Guest*, 6 D. M. G. 424, 8 H. L. C. 481, cp. *Rosher v. Williams*, 20 Eq. 210.

(c) See *Watson v. Marston*, 4 D. M. G. 230, 239, 240, and dicta there referred to.

law. And it is said in *Watson v. Marston* that the Court "must be satisfied that the agreement would not have been entered into if its true effect had been understood." Possibly this may be considered to overrule earlier decisions which certainly do furnish authority for refusing a specific performance simply on the ground of the apparent hardship of the contract. But without entering on this general question, which would lead us too far, we have now to examine whether inadequacy of consideration, not being such as to make the validity of the contract doubtful (a), is regarded as making the performance of it highly unreasonable within the meaning of the above rule: and for this purpose we assume the generality of the rule not to be affected by anything that was said in *Watson v. Marston*.

Conflicting
authorities
collected.

The authorities are so conflicting that the best course seems to be to set them against one another and leave the matter to the reader's judgment. Our own impression is that the opinion to which Lord Eldon at least inclined, and which was expressed by Lord St. Leonards and Lord Romilly, is on the whole the better supported and the more likely to be upheld whenever the point comes before a Court of final appeal.

In favour of treating inadequacy of consideration as a ground for refusing specific performance.

Contra.

Young v. Clark, Pre. Ch. 538.

Savile v. Savile, 1 P. Wms. 745.

Underwood v. Hitchcox, 1 Ves. Sr. 279.

Collier v. Brown, 1 Cox 428.

Other cases of the early part of the 18th century cited from MS. in *Howell v. George*, 1 Mad. p. 9, note (l).

Day v. Newman, 2 Cox 77, see p. 80, and *ad fin.*: the case was of a sale at a great over-value

Anon. cited in *Mortimer v. Capper*, 1 Bro. C. C. 158: (sale of an allotment to be made by In-

(a) Doubt as to the validity of the contract, short of the conclusion that it is not valid, has always been held a sufficient ground for refusing specific performance. Probably this

arose from the habit or etiquette by which courts of equity, down to recent times, never decided a legal point when they could help it.

(nearly double the real value), and there were cross suits for specific performance and for rescission. There was nothing to show fraud, but it was considered "too hard a bargain for the Court to assist in." Both bills were dismissed.

White v. Damon, 7 Ves. 30, before Lord Rosslyn.

In *Wedgwood v. Adams*, 6 Beav. 600, 606, specific performance was not enforced against trustees for sale, when the contract (as the Court inclined to think, but with some doubt whether such could have been the real intention of the parties), bound them personally to exonerate the estate from incumbrances, and it was doubtful whether these did not exceed the amount of the purchase-money. But this was not like the ordinary case of an agreement between a purchaser and a vendor in his own right, since the trustees undertook a personal risk without even the chance of any personal advantage.

Faine v. Brown, before Lord Hardwicke, cited 2 Ves. Sr. 307, and referred to by Lord Langdale in *Wedgwood v. Adams*, was a peculiar case: the hardship was not in any inadequacy of the purchase-money, but in the fact that the vendor would lose half of it by the condition on which he was entitled to the property.

In *Falcke v. Gray*, 4 Drew. 651, there was something beyond mere inadequacy: the agreement was for a purchase at a valuation, and

closure Commissioners; value unascertained at date of contract).

White v. Damon, 7 Ves. 30, 34, on re-hearing before Lord Eldon (but limited to sales by auction).

Coles v. Trecothick, 9 Ves. 234, 246, per Lord Eldon: "unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance."

Western v. Russell, 3 Ves. & B. 187, 193.

Borell v. Dann, 2 Ha. 440, 450, per Wigram, V.-C.

Abbott v. Swoorder, 4 De G. & Sm. 448, 461: per Lord St. Leonards, "the undervalue must be such as to shock the con-

there was no valuation by a competent person. V.-C. Kindersley however expressed a distinct opinion that specific performance ought to be refused on the mere ground of inadequacy, even if there were none other, relying chiefly on *White v. Damon* and *Day v. Newman*.

He referred also to *Vaughan v. Thomas*, 1 Bro. C. C. 556 (a not very intelligibly reported case, where the agreement was for the re-purchase of an annuity: the statement of the facts raises some suspicion of fraud):—to *Heathcote v. Paignon*, 2 Bro. C. C. 167; (but this and other cases there cited in the reporter's notes prove too much, for they are authorities not for refusing specific performance, but for actually setting aside agreements on the ground of undervalue alone, which we have seen is contrary to the modern law):—and to *Kien v. Stukeley*, 1 Bro. P.C. 191, where specific performance was refused by the House of Lords, reversing the decree of the Exchequer in equity (but on another ground, the question of value being “a very doubtful point among the Lords,” S. C. Gilb. 155, *nom. Keen v. Stuckley*).

The decisions in *Costigan v. Hastler*, 2 Sch. & L. 160, and *Howell v. George*, 1 Mad. 1 (though the dicta go farther), show only that a man who has contracted to dispose of a greater interest than he has will not be compelled to complete his title by purchase in order to perform the contract.

science” [i.e. as to be sufficient evidence of fraud, cp. Lord Eldon's dictum *supra*.]

Haywood v. Cope, 25 Beav. 140, 153.

To enable the reader to make a comparison which may be of some interest, we subjoin a brief notice of the provisions of the principal Continental Codes as to the effect of inadequacy of consideration on a sale.

Con-
tinental
law as to
sales at
under-
value.

The Continental enactments are derived from the rule of Roman law, Civil law, namely that a sale for less than half the true value may be set aside in favour of the seller unless the purchaser elects to make up the deficiency in the purchase-money: Cod. 4. 44. de resc. vend. 2. "Rem maioris pretii si tu vel pater tuus minoris pretii distraxerit, humanum est ut vel pretium te restituyente emtoribus fundum venditum recipias, vel, si emtor elegerit, quod deest iusto pretio recipias. Minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit." A less undervalue was not of itself a sufficient ground: C. eod. tit. 8, 15. The old French law adhered to this rule: Pothier, Obl. § 33. "On estime communément *énorme* la lésion qui excède la moitié du juste prix," *id.* Contr. de Vente, § 330, *sqq.* Pothier however goes on to say that this does not apply to sales of reversionary interests (contrat de vente de droits successifs) nor to other speculative contracts (contrats aléatoires), on account of the difficulty of fixing the true value; nor to sales of moveable property: *cp. id.* de Vente, § 341. Thus the rule and the exception, as touching immoveable property, were just the reverse of our own law as it stood before 1868. The modern French code fixes the undervalue for which a sale (of immoveable property only) may be set aside at 7-12ths. It adds this important limitation, that a general presumption of undervalue must be raised by the circumstances alleged on behalf of the seller before evidence of the actual existence and amount of the inadequacy can be admitted. There are also certain precautions as to the kind of proof to be allowed. If undervalue to the prescribed extent is established the buyer has the option of submitting to a rescission of the sale or paying up the difference. (Code Civ. 1674-1685.) Nothing is said about sales of reversionary interests, but it has been decided in accordance with the older law that the section does not apply to them: Codes Annotés, 1. 798. "Ne sont pas sujettes à la rescision pour lésion les ventes suivantes . . . [*inter alia*] La vente de droits successifs, encore qu'elle soit faite à un étranger." And the provision applies in favour of the seller only (art. 1683). Any waiver of the seller's possible rights on this score, however express, is inoperative (1674). There are exceptional provisions for the case of "partage fait par l'ascendant" (1079) and in favour of minors (1305, *sqq.*)

Old
French
law.

The Code Civil.

The provisions of the Italian Code are in substance the same as those of the Code Napoléon (Codice Civile, 1529-1537).

Italian
Code.

Prussian Code.

The provisions of the Prussian Code—Allgem. Landrecht, part. I. Tit. II. §§ 58, 59 (“Von der Verletzung über die Hälfte”)—are substantially as follows.

The objection that the purchase-money is disproportionate to the value of the thing sold does not of itself suffice to avoid the contract.

“But if the disproportion is so great that the purchase-money exceeds double the value of the thing sold, then this raises a legal presumption (*rechtliche Vermuthung*), of which the buyer may take advantage, of an error such as to avoid the contract.”

The buyer may by his contract waive the benefit of these provisions (§ 65); and the seller cannot in any case dispute the contract on the ground of undervalue.

The reason of this appears to be that the judicial presumption is not of fraud, but of error, and that the vendor cannot be presumed to be in error as to the value of his own property.

Austrian Code.

The Austrian Code (§§ 934, 935), following the extended interpretation of the Roman rule sanctioned by the prevailing modern opinion in Germany, see Vangerow, *Pand.* § 611 (3.326), enacts that inadequacy of consideration to the extent of more than one-half in any bilateral contract gives the party injured a right to call upon the other to make up the deficiency or rescind the contract at that other's option. This right may be waived beforehand, and the rule does not apply to judicial sales by auction.

Observations and summary.

Thus the French Code follows the rule of the Roman law, giving the remedy to the seller only, but adds a qualifying rule of evidence which limits the remedy to cases where there is some ground of suspicion besides the undervalue itself. The Prussian Code reverses the civil law by giving the remedy only to the buyer, and the Austrian Code extends it to both parties, and to every kind of contract for valuable consideration. These discrepancies seem to favour the conclusion that the course our own law has always taken with respect to property in possession, and now takes (since the Act 31 Vict. c. 4) with respect to property in reversion, is on the whole the wisest. It is worth while to observe that the recent Civil Code of Lower Canada has altered the law of that province in the same direction, and declares without exception that persons of full age “are not entitled to relief from their contracts for cause of lesion only” (§ 1012). On the other hand the question was considered in framing the Italian Code, and the rule of the civil law was deliberately adhered to (*Mazzoni, Diritto Civile Italiano*, 3.357).

The different enactments we have mentioned may be thus recapitulated :—

	Nature of property. Moveable or immoveable.	In possession or reversion.	Extent of inadequacy of considera- tion giving right of re- scission.	To which party.
English Law.	No distinction.	{ In possession. In reversion.	None. (Before 1868) Any. (Since 1868) None.	— Seller. —
French Code and decisions thereon (fol- lowed by Italian Code).	Immoveable only.	{ In possession. In reversion.	7-12ths (coupled with circumstances of presump- tion). None.	Seller. —
Prussian Code.	No distinction.		Over 1-2.	Buyer.
Austrian Code.	No distinction.		Over 1-2.	Either party in any contract for valu- able con- sidera- tion.

But we have still to deal with an important exceptional class of cases. That which may have been a discretionary inference when the discretion of courts of equity was larger than it now is has in these cases become a settled presumption, so that fraud, or rather undue influence, is “presumed from the circumstances and condition of the parties contracting” (a). The term fraud is indeed of common occurrence both in the earlier (a) and in the later authorities: but “fraud does not here mean deceit or circumvention; it means an unconscientious use of the power

Excep-
tional
cases of
expectant
heirs and
rever-
sioners.

(a) Lord Hardwicke in *Chesterfield v. Janssen*, 2 Ves. Sr. at p. 155, classifies this in general terms as “a third kind of fraud:” he proceeds (at p. 157) to make a separate head of catching bargains, as “mixed

cases compounded of all or several species of fraud:” but the phrase as to presumption is almost literally repeated, and it is obvious that these cases really come under his third head.

arising out of these circumstances and conditions" (a): and this does not come within the proper meaning of fraud, which is a misrepresentation (whether by untrue assertion, suppression of truth, or conduct) made with the intent of creating a particular wrong belief in the mind of the party defrauded. Perhaps the best word to use would be imposition, as a sort of middle term between fraud, to which it comes near in popular language, and compulsion, which it suggests by its etymology.

The class of persons in dealing with whose contracts the Court of Chancery has thus gone beyond its general principles are those who stand, in the words of the Master of the Rolls, "in that peculiar position of reversioner or remainderman which is oddly enough described as an expectant heir. This phrase is used, not in its literal meaning, but as including every one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor—either by reason of his being the heir apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen, as appears from *Tottenham v. Emmet* (b) and *Earl of Aylesford v. Morris* (c). So that the doctrine not only includes the class I have mentioned, who in some popular sense might be called expectant heirs, but also all remaindermen and reversioners" (d).

Motives
for excep-
tional
treatment:
1. Pre-
sumption
of fraud.

The recent Act 31 Vict. c. 4 has modified the practice of the Court of Chancery (which now continues in the Chancery Division) less than might be supposed: it is therefore necessary to give in the first place a connected view of the whole doctrine as it formerly stood. It was considered that persons raising money on their expectancies were at such a disadvantage as to be peculiarly exposed to imposition and fraud, and to require an extraordinary degree of protection (e): and it was also thought

(a) Per Lord Selborne, *Earl of Aylesford v. Morris*, 8 Ch. 484, 491.

(b) 14 W. R. 3.

(c) 8 Ch. 484.

(d) *Beynon v. Cook*, 10 Ch. 391, n.

(e) "A degree of protection approaching nearly to an incapacity to bind themselves by any contract:" Sir W. Grant in *Peacock v. Evans*, 16 Ves. at p. 514.

right to discourage such dealings on a general ground of public policy, as tending to the ruin of families (a) and in most cases involving "a sort of indirect fraud upon the heads of families from whom these transactions are concealed" (b).

2. Public policy as to welfare of families.

Moreover, laws against usury were in force at the time when courts of equity began to give relief against these "catching bargains" as they are called (c); any transactions which looked like an evasion of those laws were very narrowly watched, and it may be surmised that when they could not be brought within the scope of the statutes the Courts felt justified in being astute to defeat them on any other grounds that could be discovered (d).

3. Evasion of usury laws.

The doctrine which was at first introduced for the protection of expectant heirs was in course of time extended to all dealings whatever with reversionary interests. In its finally developed form it had two branches:—

Extension of the doctrine.

1. As to reversionary interests, whether the reversioner were also an expectant heir or not:

A. The rule of law that the vendor might avoid the sale for undervalue alone:

B. The rule of evidence that the burden of proof was on the purchaser to show that he gave the full value.

It is this part of the doctrine that is changed by the Act 31 Vict. c. 4.

(a) *Twisleton v. Griffith*, 1 P. Wms. at p. 312; *Cole v. Gibbons*, 3 P. Wms. at p. 293; *Chesterfield v. Janssen*, 2 Ves. Sr. at p. 158.

(b) Per Lord Selborne, *Earl of Aylesford v. Morris*, 8 Ch. 484, 492; *Chesterfield v. Janssen*, 2 Ves. Sr. 124, 157.

(c) In *Wiseman v. Beake*, 2 Vern. 121, it appears from the statement of the facts that twenty years or thereabouts after the Restoration this jurisdiction was regarded as a novelty: for the defendant's testator "understanding that the Chancery began to relieve against such bargains" took certain steps to make himself safe, but without success, the Court pronouncing them "a contrivance only

to double hatch the cheat." But in *Ardglas v. Muschamp*, 1 Vern. 238, it is said that many precedents from Lord Bacon's, Lord Ellesmere's, and Lord Coventry's times were produced.

(d) The reports of the cases on this head anterior to *Chesterfield v. Janssen* are unfortunately so meagre that it is difficult to ascertain whether they proceeded on any uniform principle. But the motives above alleged seem on the whole to have been those which determined the policy of the Court. On the gradual extension of the remedy cp. the remarks of Burnett, J. in *Chesterfield v. Janssen*, 2 Ves. Sr. at p. 145.

2. As to "catching bargains" with expectant heirs and remaindermen or reversioners in similar circumstances, i.e. bargains made in substance on the credit of their expectations, whether the property in expectancy or reversion be ostensibly the subject-matter of the transaction or not (a) :

The rule of evidence that the burden of proof lies on the other contracting party to show that the transaction was a fair one. We use the present tense, for neither the last mentioned Act nor the repeal of the usury laws, as we shall see presently, has made any change in this respect.

The part of the doctrine which is abrogated was intimately connected both in principle and in practice with that which remains ; and it seems still advisable to give some account of the manner in which it was applied.

Former doctrine as to sales of reversionary interests.

In the leading case of *Earl of Aldborough v. Trye*, 7 Cl. & F. 436, the general rule above stated, which had been very broadly asserted in earlier cases (b), notably in *Gowland v. De Faria*, 17 Ves. 20, 24, was confirmed : and it was further settled that the *full value* which the purchaser of a reversionary interest was bound to show that he had given was not the *actuarial value* (c), i.e. the value as calculated by an actuary from the tables, but the *fair market price* at the time of the sale (which would generally be less than the actuarial value). On this last principle sales by auction were treated with more favour than sales by private contract : for a sale by auction was of itself *prima facie* evidence of the market price : *Shelly v. Nash*, 2 Mad. 232, 236 : but this might be rebutted by other circumstances, e.g. the sale being without reserve and the bidders knowing of the vendor's distress : *Fox v. Wright*, 6 Mad. 111. There was no fixed rule that a sale of a reversion must be by auction (*Edwards v. Burt*, 2 D. M. G. 55 ; *Lord v. Jeffkins*, 35 Beav. 7, 16), but in practice a purchaser was hardly safe in buying otherwise (*Foster v. Roberts*, 29 Beav. at p. 471).

Generally it was the purchaser's duty to preserve abundant evidence of the full value having been given (*Salter v. Bradshaw*, 26 Beav. 161, 164) ; nor was he relieved from this burden of proof by any difficulty of ascertaining the true value, whether caused by the property being in fact unmarketable, or by the interest disposed of depending on a complex or speculative contingency, such as the death without

(a) *Earl of Aylesford v. Morris*, 8 Ch. at p. 497.

(b) *Contra Moth v. Atwood*, 5 Ves. 845 ; but this appears to have been a solitary exception.

(c) The adoption of the "actuarial" standard in *Gowland v. De Faria* was explained by the fact that in that case no other evidence was offered.

issue of a particular living person. In the former case evidence had to be procured from experts (*i.e.* auctioneers rather than actuaries) that the price given was the best that could be got: *Tynte v. Hodge*, 2 H. & M. 287, 298. In cases of the latter kind the uncertainty of the risk did not prevent the Court from interfering: *Bowes v. Heaps*, 3 Vea. & B. 117: an inquiry might be directed, *Boothby v. Boothby*, 1 Mac. & G. 604: nor could the purchaser merely by showing that the value he gave was substantial throw back upon the vendor the burden of proving it inadequate, *Talbot v. Staniforth*, 1 J. & H. 484, 504; nor was the rule relaxed even where it appeared to the Court impossible to ascertain the real value: *Benyon v. Fitch*, 35 Beav. 570, 575. There were indeed earlier dicta against setting a value on complex contingencies (*Baker v. Bent*, 1 Russ. & M. 224, 229; *cp.* as to this, and also as to the distinction between market value and actuarial value, Lord Eldon's remark in *Low v. Barchard*, 8 Ves. at p. 136: and see 35 Beav. 11). But if the purchaser had bought at the vendor's own valuation of the corpus of the property, he was not bound in the absence of evidence the other way to show that it was not too low: *Perfect v. Lane*, 3 D. F. J. 369, 377.

The doctrine applied to reversionary life interests as well as to reversions in capital (*Edwards v. Burt*, 2 D. M. G. 55); to the sale of a reversionary interest coupled with an interest in possession, (*Davis v. Duke of Marlborough*, 2 Swanst. 108, 154, *Nesbitt v. Berridge*, 32 Beav. 280, 286) (a); to dealings with personal property, in a mixed fund with real property (*Edwards v. Browne*, 2 Coll. 100), or alone (*Foster v. Roberts*, 29 Beav. 467); and to leases (*Grosvenor v. Sherratt*, 28 Beav. 659, 664) and charges on reversionary interests as well as to sales (*Davis v. Duke of Marlborough*; *Bromley v. Smith*, 26 Beav. 644; *Benyon v. Fitch*, 35 Beav. 570). Proof that the vendor was of mature age and fully understood what he was doing made no difference, nor was he bound to show that he was in any distress at the time of the sale: *Bromley v. Smith*.

The presumption originally thought to arise from transactions of this kind had in fact become transformed into an inflexible rule of law: and the consistent application of the rule made it well nigh impossible to deal with reversionary interests at all. The modern cases almost look as if the Court, finding it too late to shake off the doctrine, had sought to call the attention of the legislature to its inconvenience by extreme instances. Sales were set aside after the lapse of such a length of time as 19 years (*St. Alban v. Harding*, 27 Beav. 11) and even 40 years (*Salter v. Bradshaw*, 26 Beav. 161). A sub-purchaser who bought at a considerably advanced price was held by this alone to have notice of the first sale having been at an under-

(a) S. C. 4 D. J. S. 45, but no appeal on this point.

value (*Nesbitt v. Berridge*, 32 Beav. 280). In one case where the price paid was 200*l.*, and the true value as estimated by the Court 238*l.*, the sale was set aside on the ground of this undervalue, though the question was only incidentally raised and the plaintiff's case failed on all other points (*Jones v. Ricketts*, 31 Beav. 130). A general view of the doctrine is given by Lord Selborne in *Aylesford v. Morris*, 8 Ch. at pp. 489-92: and remarks on the policy of the rule as to reversions are to be found in *Bromley v. Smith*, 26 Beav. at p. 665, and *Webster v. Cook*, 2 Ch. at pp. 544, *n.*, 546, as well as in some other of the authorities already cited.

Act to
amend the
law re-
lating to
sales of
reversions,
31 Vict.
c. 4.

Finally Parliament found it necessary to interfere, and by the "Act to amend the law relating to sales of reversions," 31 Vict. c. 4 (7th December, 1867), it was enacted (s. 1) that no purchase (defined by s. 2 to include every contract, &c., by which a beneficial interest in property may be acquired), made *bona fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate, should after January 1, 1868, (s. 3) be opened or set aside merely on the ground of undervalue. Subject only to a saving of pending suits (s. 3) this Act is retrospective, and this is the more remarkable inasmuch as the right taken away by it from any vendor of a reversion who might otherwise have set aside the sale on the ground of undervalue alone was (as in the case of a sale voidable on any other ground) not a mere right of suit, but an interest which was transmissible by descent or devise (*a*).

Limited
effect of
the Act.

The act is carefully limited to its special object of putting an end to the arbitrary rule of equity which was an impediment to fair and reasonable as well as to unconscionable bargains. It leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief (*b*).

General
rules of
equity

It had already been decided in *Croft v. Graham* (*c*) that the repeal of the usury laws (*d*) did not alter the general rules of the

(*a*) *Gresley v. Mousley*, 4 De G. & J. 78, 93.

(*b*) *Earl of Aylesford v. Morris*, 8 Ch. at p. 490. See also *O'Rorke v. Bolingbroke*, 2 App. Ca. 814.

(*c*) 2 D. J. S. 155.

(*d*) 17 & 18 Vict. c. 90. But before this complete repeal ex-

ceptions had been made from the usury laws in favour of certain bills of exchange, and loans exceeding 10*l.* not secured on land: 3 & 4 Wm. 4, c. 98, s. 7, 2 & 3 Vict. c. 37, s. 1, and comments thereon in *Lane v. Horlock*, 5 H. L. C. 480.

Court of Chancery as to dealings with expectant heirs. This decision was followed in *Miller v. Cook* (a) and adhered to in *Tyler v. Yates* (b), and lastly in *Earl of Aylesford v. Morris* (c) and *Beynon v. Cook* (d), and in the two latter cases it has been clearly laid down that the rules are in like manner unaffected by the change in the law concerning sales of reversions. And this was confirmed by all the opinions delivered in the recent case of *O'Rorke v. Bolingbroke* (e) in the House of Lords, though the particular transaction in dispute was upheld.

The effect of these rules is not to lay down any proposition of substantive law, but to make an exception from the ordinary rules of evidence by throwing upon the party claiming under a contract the burden of proving, not merely that the essential requisites of a contract, including the other party's consent, existed, but also that such consent was perfectly free. The question is therefore, what are "the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it" (f). Now these conditions have never been fixed by any positive authority. We have seen that the Court of Chancery has refused to define fraud, or to limit by any enumeration the standing relations from which influence will be presumed. In like manner there is no definition to be found of what is to be understood by a "catching bargain." This being so we can only observe the conditions which have in fact been generally present in the bargains against which relief has been given in the exercise of this jurisdiction. These are:—

1. A loan in which the borrower is a person having little or no property immediately available, and is trusted in substance on the credit of his expectations.

(a) 10 Eq. 641.

(b) 11 Eq. 265, 6 Ch. 665.

(c) 8 Ch. 484; this may now be regarded as the leading case on the subject. It should be observed that in *Tyler v. Yates* a principal and surety made themselves liable for a bill which the principal had accepted during his minority, without knowing that there was no existing legal liability on the bill, and all the subsequent transactions were bound up with this: and the case was rested on this ground in the Court of Appeal (p. 671). Cp.

on this point *Coward v. Hughes*, 1 K. & J. 443, where a widow who during her husband's life had joined as surety in his promissory note executed a new note under the impression that she was liable on the old one, and without any new consideration, and the note was set aside: see *Southall v. Rigg* and *Forman v. Wright*, 11 C. B. 481, 20 L. J. C. P. 145.

(d) 10 Ch. 389.

(e) 2 App. Ca. 814.

(f) *Earl of Aylesford v. Morris*, 8 Ch. at p. 492.

as to
"catching
bargains"
unaffected.

Conditions
throwing
burden of
proof on
lender.

Obs. It is immaterial whether there is or not any actual dealing with the estate in remainder or expression of the contingency on which the fund for payment of the principal advanced substantially depends. *Earl of Aylesford v. Morris*, 8 Ch. at p. 497.

2. Terms *prima facie* oppressive and extortionate (i.e. such that a man of ordinary sense and judgment cannot be supposed likely to give his free consent to them).

Obs. An excessive rate of interest is in itself nothing more than a disproportionately large consideration given by the borrower for the loan : and it is not sufficient, standing alone, to invalidate a contract in equity : *Webster v. Cook*, 2 Ch. 542, where a loan at 60 per cent. per annum was upheld. Stuart, V.-C. disapproved of the case in *Tyler v. Yates* (11 Eq. at p. 276) but on another point. And see *Parker v. Butcher*, 3 Eq. 762, 767.

3. A considerable excess in the nominal amount of the sums advanced over the amount actually received by the borrower.

Obs. This appears in all the recent cases in which relief has been given : deductions being made on every advance, according to the common practice of professed money-lenders, under the name of discount, commission, and the like. The result is that the rate of interest appearing to be taken does not show anything like the terms on which the loan is in truth made : and this may be considered evidence of fraud so far as it argues a desire on the part of the lender to gloze over the real terms of the bargain. Probably however a jury could not be directed so to consider it in a trial where fraud was distinctly in issue ; though no doubt such circumstances, or even an exorbitant rate of interest, would be made matter of observation.

4. The absence of any real bargaining between the parties, or of any inquiry by the lender into the exact nature or value of the borrower's expectations.

Obs. These circumstances are relied on in *Earl of Aylesford v. Morris* (8 Ch. at p. 496) as increasing the difficulty of upholding the transaction. This again is the usual practice of the money-lenders who do this kind of business. Their terms are calculated to cover the risk of there being no security at all ; moreover the borrower often wishes the lender not to make any inquiries which might end in the matter coming to the knowledge of the ancestor or other person from whom the expectations are derived. The concealment of the transaction from the ancestor was held by Lord Brougham in *King v. Hamlet*, 2 M. & K. 456, to be an indispensable condition of equitable relief ; but

this opinion is not now accepted (*Earl of Aylesford v. Morris*, 8 Ch. at p. 491). The decision in *King v. Hamlet* (affirmed in the House of Lords, but without giving any reasons, 3 Cl. & F. 218) can be supported on another ground, viz. that a party to a voidable contract cannot rescind it if he has so acted under the contract as to make it impossible to restore the former state of things, as we have seen in Chap. X, p. 510 above.

It seems safe to assert that in any case where these conditions concur, the burden of proof is thrown on the lender to show that the transaction was a fair one: it seems equally unsafe to assert that they must all concur, or that any one of them (except perhaps the first) is indispensable.

It may then be asked, By what sort of evidence is the lender to satisfy the Court that the borrower was not imposed on? As there is no reported case in which it was considered that the burden of proof lay upon the lender, and yet he did so satisfy the Court, it is impossible to give any certain answer to this question. But it does not take very much reflection to see that it is in fact extremely improbable that in any case where the above-mentioned conditions are present any satisfactory evidence should be forthcoming to justify the lender (a). Practically the question is whether in the opinion of the Court the transaction was a hard bargain (b)—that is, not merely a bargain in which the consideration is inadequate, but an unconscionable bargain where one party takes an unfair advantage of the other (c).

Qu. if lender so situated can in practice ever exonerate himself.

An account stated for the purpose of a contract of this description is of no more validity than the contract itself, and a recital of it in the security does not preclude the borrower from re-opening the account even as against purchasers or sub-mortgagees of the original lender who have notice of the general character of the transaction. For such notice is equivalent to notice of all the legal consequences (d).

(a) "No attempt has been made to show by any independent evidence (if such a thing could be conceived possible) that the terms thus imposed on the plaintiff were fair and reasonable," 8 Ch. 496.

(b) See the judgment of the M. R. *Beynon v. Cook*, 10 Ch. 391, n.

(c) Per Jessel, M. R. in *Middleton*

v. Brown (C. A.), Feb. 20, 1878 (not yet reported).

(d) *Tottenham v. Green*, 32 L. J. Ch. 201: a case decided under the old rule as to dealings with reversionary interests, but the principles seem applicable in all cases where the burden of proof is still on the lender.

Terms
on which
relief is
given.

The borrower who seeks relief against a contract of this description must of course repay whatever sums have been actually advanced, with reasonable interest (according to the usual practice of the Court, 5 per cent.), and the relief is granted only on those terms. Moreover it is held not unjust that he should obtain it at his own expense, since he calls in the assistance of the Court to undo the consequences of his own folly (*a*): and accordingly the general rule is to give no costs on either side (*b*).

As to the
lender
suing
on the
contract.

The rule of evidence casting a special burden of proof on the lender being peculiar to equity, there was generally no defence at law to an action brought by him to enforce a contract of this kind: nor would an equitable plea under the Common Law Procedure Act have been available, since such pleas were admitted only when they showed cause for absolute and unconditional equitable relief. But the rule of evidence hitherto followed in equity must now prevail in every Division of the High Court, and the probable effect of this in the Common Law Divisions may be expressed as follows:

When a lender of money sues on a special contract, whether such contract be embodied in a negotiable instrument or not, and the borrower proves facts which bring the contract within the description of a "catching bargain" as understood by courts of equity, the lender must prove the reasonableness of the bargain (*c*); and if he fails to do so, he cannot recover on the special contract, but can recover his principal and reasonable interest as on a common count for money lent. It must be noticed that the importance of this class of cases is much diminished, though the law is not affected, by the Infants'

(*a*) *Earl of Aylesford v. Morris*, 8 Ch. at p. 499.

(*b*) In the cases of sales of reversions under the former law on that head the practice was for some time to treat the suit as a redemption suit, and give the purchaser his costs as a mortgagee: but the later rule was to give no costs on either side, except that the plaintiff had to bear such as were occasioned by any unfounded charges of actual fraud: *Edwards v. Burt*, 2 D. M. G. at

p. 65; *Bromley v. Smith*, 26 Beav. at p. 676, and costs might be given against the defendant as to any transaction in which there had been misconduct on his part: *Tottenham v. Green*, 32 L. J. Ch. 201, 206.

(*c*) *Qu.* is this a question for the jury or for the Court? *Prima facie* it should be a question of fact: but there are some analogies (*e.g.* the cases on restraint of trade) for treating it as a question of law.

Relief Act 1874, which makes loans of money to infants absolutely void and forbids any action to be brought on a promise to pay debts contracted during infancy. See p. 42 *supra*.

The same principles apply, so far as they are applicable to a transaction of sale as distinguished from loan, to the sale of reversionary interests by persons who are not in an independent position, as when the sale is made by a man only just of age in pursuance of terms settled while he was still an infant. Here the burden is on the purchaser to show the fairness of the transaction. He is not bound to show that the price given was absolutely adequate; but he is bound, notwithstanding the Act of 1867, (31 Vict. c. 4, p. 552 above) to show that it was such as, upon the facts known to him at the time, he might have reasonably thought adequate. Moreover he ought to see, where practicable, that the seller has independent legal advice. These rules seem to be established by *O'Rorke v. Bolingbroke* (a), which is remarkable as an almost singular instance of an impeached transaction with an "expectant heir" being upheld. There a father and son negotiated with a purchaser for the sale of the son's reversionary interest expectant on the death of the father. The sale was completed three weeks after the son came of age. The price was agreed to after some bargaining; it was founded on a statement of value furnished by a third person, and would have been adequate if the father's life had been a good one. The purchaser did not know and had no reason to believe anything to the contrary, but it was in fact a bad life. The young man took no independent advice, being "penniless, and except for his father friendless" (b). The father died within three months after the sale. Four years later the son sued to have the whole transaction set aside, but failed in the House of Lords after succeeding in the Court of Appeal in Ireland. The majority of the Lords (c) held that the burden of proof was indeed on the buyer, but that he had satisfied it. Lord Hatherley dissented, thinking that it was the buyer's absolute duty to see that the young man had independent advice.

(a) 2 App. Ca. 814.

(b) Lord Blackburn, at p. 837.

(c) Lord Blackburn, Lord O'Hagan, and Lord Gordon.

Applica-
tion of
principles
to sales of
rever-
sionary
interests
by persons
in depen-
dent posi-
tion.

"Surprise"
and "im-
provi-
dence."

We have yet to examine another alleged ground of equitable relief against contracts, founded on the notion of an inequality between the contracting parties: we say alleged, for we adopt the opinion, for which there is high authority, that it ought not to be treated as a substantial ground for avoiding transactions, but only as matter of evidence: we mean "surprise," or "surprise and improvidence."

Evans v.
Llewellyn

The case of *Evans v. Llewellyn* (a) may be taken as the typical instance. The plaintiff was a person of inferior station and education who acquired by descent a title in fee simple to a share in land in which the defendant had a limited interest. His title was first communicated to him by the defendant, who represented to him (as the fact appears to have been) that the circumstances of the family created a moral obligation in the plaintiff not to insist on his strict rights, and offered to purchase his interest for a substantial though not adequate consideration. The defendant suggested to the plaintiff to consult his friends in the matter, which however he did not do. Three days intervened between the first interview and the conclusion of the business by the acceptance of the defendant's offer. It was considered that the plaintiff was under the circumstances not a free agent and not equal to protecting himself, and was taken by surprise, and the sale was set aside (b).

The case seems somewhat anomalous, but it has been suggested by very high authority that it would still be followed in setting aside a contract as "improvident and hastily carried into execution" (c), and it has been distinctly approved in the Court of Appeal in Chancery (d).

Qu. if
"surprise"

It is submitted, however, that there is no intelligible reason for treating *surprise* or *improvidence* as a substantive cause for

(a) See following note.

(b) 2 Bro. C. C. 150; 1 Cox 333, a fuller report, which is here followed; the other if correct would reduce it to a plain case of fraud or at all events misrepresentation. In the recent case of *Haygarth v. Wearing*, 12 Eq. 320, which to some extent resembled this, the ground of the decision was a positive misrepresentation as to the value of the

property.

(c) Lord St. Leonards in *Curson v. Belworthy*, 3 H. L. C. 742: there the appellant relied on express charges of fraud, which were not made out: but Lord St. Leonards thought he might possibly have succeeded if he had rested his case on the ground suggested.

(d) Per Turner, L. J. in *Baker v. Monk*, 4 D. J. S. at p. 392.

setting aside contracts, much less for attempting to give these words a technical signification. Both terms are in fact merely negative and relative. *Surprise* is nothing else than the want of mature deliberation: *improvidence* is nothing else than the want of that degree of vigilance which a man of ordinary prudence may be expected to use in guarding his own interest. Now one man's deliberation and prudence are not the same as another man's, nor is the same man equally deliberate or prudent at all times. A man may enter into a contract with less deliberation than the average wisdom of mankind would counsel, or than he himself commonly uses, in affairs of the like nature, and yet the contract may be perfectly valid. But he must in any case understand what he is doing; for if he does not, there is no true consent and no contract (a); and his consent must be freely given; for if it is not, the contract is voidable at his option. And if it be disputed whether there was or not any real consent, or whether consent was or not freely given, then circumstances of what is called *surprise* or *improvidence* may be very material as evidence bearing on those issues. Unusual haste or folly in entering into an engagement is a circumstance to be accounted for: and the best way of accounting for it may in all the circumstances of a particular case be to suppose that the party did not know what he was about, or that he was wrought upon by conduct of the other party of such a kind as to make the contract voidable on the ground of fraud, or the like. *Surprise* and *improvidence*, therefore, are matters from which those whose province it is to judge of the facts may conclude, as a fact in particular cases, that there was no true consent, or that the consent was not free. But it is not to be affirmed as a general proposition of law that haste or imprudence can of itself be a sufficient cause for setting aside a contract, nor even that there is any particular degree of haste or imprudence from which fundamental error, fraud, or undue influence, will be invariably presumed. "The Court will not measure the degrees of understanding" (b). It seems to follow that what is recorded in such a case as *Evans v. Llewellyn* (c) is not an enunciation of

&c. any substantive cause for avoiding contracts.
But circumstances of this kind may be material for proving the existence of distinct grounds for avoiding the contract, as fundamental error or fraud.
Possible explanation of *Evans v.*

(a) The cases of lunacy and drunkenness are exceptionally treated, the contract being only voidable, *supra*, Ch. II. p. 80, and see p. 406.

(b) *Bridgman v. Green*, Wilmot 58, 61.

(c) 1 Cox 333.

Llewellyn. law, but an inference of fact. Such an inference, it is conceived, may be useful in the way of analogy when similar circumstances recur, but is not binding as an authority. The view here taken may be supported by the observations of the judges in *The Earl of Bath and Mountague's Case* (A.D. 1693) (a). In that case Baron Powel said (3 Ch. Ca. at p. 56):

Opinions
of judges
in *Earl of
Bath and
Moun-
tague's
case.*

“It is said, This is a Deed that was obtained by Surprise and Circumvention. Now I perceive this word Surprise is of a very large and general Extent . . . I hardly know any Surprise that should be sufficient to set aside a Deed after a Verdict, unless it be mixed with Fraud, and that expressly proved.” [i.e. the verdict in favour of the deed precludes the party from asserting in equity that he did not know what he was about: for he should have set up that case at law on the plea of *non est factum*]. “It must be admitted that there was Deliberation, and Consideration and Intention enough proved to make it a good Deed at Law, otherwise there would not have been a Verdict for it”: per L. C. J. Treby, *ib.* at p. 74.

The judgment of the Lord Keeper Somers is even more decided, and points out clearly the difference between an instrument which is void both at law and in equity, and one which is voidable in equity (p. 108):—

“It is true, it is charged in the Bill that this Deed was obtained by Fraud and Surprise . . . But whosoever reads over the Depositions will see that the End they aimed at was to attack the Deeds themselves as false Deeds and not truly executed; but that being Tried at Law, and the Will and Deeds verified by a Verdict, the Counsel have attempted to make use of the same Evidence, and read it all, or at least the greatest Part of it, as Evidence of Surprise and Circumvention . . .

“Now, for this word (Surprise) it is a Word of a general Signification, so general and so uncertain, that it is impossible to fix it; a Man is surpriz'd in every rash and indiscreet Action, or whatsoever is not done with so much Judgment and Consideration as it ought to be: But I suppose the Gentlemen who use that Word in this Case mean such Surprise as is attended and accompanied with Fraud and Circumvention; such a Surprise indeed may be a good ground to set aside a Deed so obtain'd in Equity and hath been so in all times; but any other Surprise never was, and I hope never will be, because it will introduce such a wild Uncertainty in the Decrees and Judgments of the Court, as will be of greater Consequence than the Relief in any Case will answer for.”

(a) 3 Ch. Ca. 55. Cp. Story, Eq. Jurisp. § 251.

Moreover the doctrine thus stated is exactly analogous to that which we have seen to be undoubted law concerning inadequacy of consideration. The value of the subject-matter of a contract, and therefore the adequacy of the consideration, which depends on it, is surely in most cases easier to measure than the degree of deliberation or prudence with which the contract was entered into. It can hardly be contended on principle that "surprise" or "improvidence," which in fact represent nothing but an opinion of the general character of a transaction, founded on a precarious estimate of average human conduct, ought to have a greater legal effect than inadequacy of consideration, which generally admits of being determined by reference to the market value of the object at the date of the contract.

Analogy to doctrine as to inadequacy of consideration.

5. Limits of the right of rescission.

The right of setting aside a contract or transfer of property voidable on the ground of undue influence is analogous to the right of rescinding a transaction voidable on any other ground, and follows the same rules with some slight modifications in detail.

The right of rescission is like that in cases of fraud, &c. and governed by same rules.

What is said in the last chapter of rescinding contracts for fraud or misrepresentation may be taken as generally applicable here. We proceed to give some examples of the special application of the principles.

The right to set aside a gift or beneficial contract voidable for undue influence may be exercised by the donor's representatives or successors in title (a) as well as by himself, and against not only the donee but persons claiming through him (b) otherwise than as purchasers for value without notice (c). But the jurisdiction is not exercised at the suit of third persons. The Court will not refuse, for example, to pay a fund, at the request of a petitioner entitled thereto, to the trustees of a deed of gift previously executed by the petitioner, because third parties suggest that the gift was not freely made (d).

Examples.

(a) *E. g.* Executor: *Hunter v. Atkins*, 3 M. & K. 113; *Coutts v. Aisworth*, 8 Eq. 558. Assignee in bankruptcy: *Ford v. Olden*, 3 Eq. 461. Devisee: *Gresley v. Mousley*, 4 De G. and J. 78. Heir: *Holman v. Loyne*, 4 D. M. G. 270.

(b) *Huguenin v. Baseley*, 14 Ves. 273, 289. Cp. *Molony v. Kernan*, 2 Dr. & W. 31, 40.

(c) *Cobbett v. Brock*, 20 Beav 524, 528.

(d) *Metcalf's tr.* 2 D. J. S. 122.

Jurisdiction not confined to influence of actual party to the contract.

On the other hand it is not necessary to the support of a claim to set aside a contract on the ground of undue influence to show that the influence was directly employed by another contracting party. It is enough to show that it was employed by some one who expected to derive benefit from the transaction, and with the knowledge of the other party or under circumstances sufficient to give him notice of it. The most frequent case is that of an ancestor or other person *in loco parentis* inducing a descendant, etc., to give security for a debt of the ancestor. But if the other party does all he reasonably can to guard against undue influence being exerted (as by insisting on the person in a dependent position having independent professional advice), and the precautions he demands are satisfied in a manner he cannot object to at the time, the contract cannot as against him be impeached (a).

It appears to be at least doubtful whether a contract can be set aside on the ground of influence exerted on one of the parties by a stranger to the contract who did not expect to derive any benefit from it (b): except where the contract is an arrangement between cestuis que trust claiming under the same disposition, and the trustee puts pressure on one of the parties to make concessions; the ground in this case being the breach of a trustee's special duty to act impartially (c).

Confirmation and acquiescence.

The right to set aside a contract originally voidable on the ground of undue influence may be lost by express confirmation (d) or by delay amounting to proof of acquiescence (e). But any subsequent confirmation will be inoperative if made in the same absence of independent advice and assistance which vitiated the transaction in the beginning (f). This has been strongly stated in the judgment of the Lords Justices in *Maron v. Payne* (g): "Frauds or impositions of the kind practised in this

(a) Compare *Cobbett v. Brock*, 20 Beav. 524, with *Berdoe v. Dawson*, 34 Beav. 603. As to what amounts to notice, *Maitland v. Backhouse*, 16 Sim. 58; *Tottenham v. Green*, 32 L. J. Ch. 201.

(b) *Bentley v. Mackay*, 31 Beav. 148, 151. On principle the answer should clearly be in the negative.

(c) *Ellis v. Barker*, 7 Ch. 104.

(d) *Stump v. Gaby*, 2 D. M. G.

623; *Morse v. Royal*, 12 Ves. 355.

(e) *Wright v. Vanderplank*, 8 D. M. G. 133, 147; *Turner v. Collins*, 7 Ch. 329.

(f) *Savery v. King*, 5 H. L. C. at p. 664.

(g) 8 Ch. 881, 885. And a confirmation will not be helped by the presence of an independent adviser of the party confirming, if, in consequence of the continuing influence

case cannot be condoned ; the right to property acquired by such means cannot be confirmed in this Court unless there be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and an absolute release from the undue influence by means of which the frauds were practised. To make a confirmation or compromise of any value in this Court the parties must be at arm's length, on equal terms, with equal knowledge, and with sufficient advice and protection." If it is made without knowledge of the invalidity of the original transaction it is wholly inoperative (a). And delay which can be accounted for as not unreasonable in all the circumstances is no bar to relief (a). In short, an act "the effect of which is to ratify that which in justice ought never to have taken place" ought to stand only upon the clearest evidence (b). The effect of delay on the part of the person seeking relief is also subject to a special limitation. In a case between solicitor and client, or parties standing in any other confidential relation, less weight is given to the lapse of time than is due to it when no such relation subsists (c).

An adoption of the instrument impeached for a particular purpose (as by the exercise of a power contained in it) may operate as an absolute confirmation of the whole (d).

It seems that the presumption of influence arising from confidential relations is not to be extended to cases where a merely trifling benefit is conferred (e). This is more than a simple application of the maxim *De minimis non curat lex*, for the transaction brought in question might be in itself of great magnitude and importance, though the advantage gained by one party over the other were not large. Indeed the case to which this principle seems most likely to be applicable is that of a transaction not of a commercial nature and on such a scale that the parties, dealing fairly and deliberately, might choose not to be curious in weighing a comparatively small balance of profit or loss.

Semble,
no pre-
sumption
of undue
influence
where the
gain is
trifling.

of the other party, his advice is in fact disregarded : *ib.*

(a) *Kempson v. Ashbee*, 10 Ch. 15.

(b) *Morse v. Royal*, 12 Vea. at p. 374.

(c) *Gresley v. Mousley*, 4 De G. & J. 78, 96. But even in a case between

solicitor and client a delay of eighteen years has been held fatal : *Champion v. Rigby*, 1 Russ. & M. 539.

(d) *Jarratt v. Aldam*, 9 Eq. 463.

(e) Per Turner, L. J. *Rhodes v. Bate*, 1 Ch. at p. 258.

APPENDIX G.

INDIAN CONTRACT ACT ON FRAUD, ETC.

Indian
Contract
Act on
Fraud, &c.

The sections of the Indian Contract Act dealing with the subjects we have considered in the last four chapters are the following (a) :

10. All agreements are contracts (b) if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.
13. Two or more persons are said to consent when they agree upon the same thing in the same sense.
14. Consent is said to be free when it is not caused by
 - (1) coercion, as defined in section fifteen, or
 - (2) undue influence, as defined in section sixteen, or
 - (3) fraud, as defined in section seventeen, or
 - (4) misrepresentation, as defined in section eighteen, or
 - (5) mistake, subject to the provisions of sections twenty, twenty-one, and twenty-two.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.

15. Coercion is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

[This goes far beyond English law, for it does not require that the coercion should be exercised by or even known to the other party, nor that the person coerced should be the party whose consent is to be obtained, or in any way related to him.]

16. Undue influence is said to be employed in the following cases :—
 - (1) When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other, which, but for such confidence or authority, he could not have obtained ;

(a) The illustrations are here 492, 532).
omitted. Some of them have been
already cited in the text (pp. 425,

(b) See the definitions in s. 2,
p. 6 above.

- (2) When a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion.

Fraud means and includes any of the following acts committed by a party to a contract or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

- (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true ;
- (2) The active concealment of a fact by one having knowledge or belief of the fact ;
- (3) A promise made without any intention of performing it ;
- (4) Any other act fitted to deceive ;
- (5) Any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is in itself equivalent to speech.

[This and the last section substantially represent English law.]

18. Misrepresentation means and includes—

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true ;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him ;
- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

[This appears to represent the rules of equity, or at any rate the strong tendency of modern decisions. Sub-s. (2) seems hardly in place here. The framers of the draft Civil Code of New York, from which it is taken, (§ 758) appear to have generalized from *Bulkley v. Wilford*, 2 Cl. & F. 102. That case, however, proceeds rather on the special duty of an agent, see p. 254 above ; and the *ratio decidendi* is expressly that a professional agent shall not take advantage of his own ignorance. There was also evidence and a finding of actual fraud.]

19. When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation, or by silence fraudulent within the meaning of section seventeen, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

[This agrees with English law, save that with us the exception, if it exists, is limited to cases of mere non-disclosure : p. 488 above.]

20. Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

[This section is embodied and commented upon in the text, p. 425 above.]

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

21. A contract is not voidable because it was caused by a mistake as to any law in force in British India ; but a mistake as to a law not in force in British India has the same effect as a mistake of fact.

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

Nothing is said as to the time within which a voidable contract must be rescinded ; the obligation to restore any advantage received under the contract is declared in ss. 64, 65 ; but it does not appear what is to happen if restitution is impossible ; as to goods obtained under a voidable contract, the title of “ a third person who before the contract is rescinded buys them in good faith of the person in possession ” is secured by s. 108, exception 3, “ unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession

or those whom he represents," a limitation which appears to be new ; but no general principle is laid down as to rights of third persons intervening. S. 66 provides that "the rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal."

CHAPTER XII

AGREEMENTS OF IMPERFECT OBLIGATION.

Nature of
imperfect
obliga-
tions.

Under this head we propose to deal with topics of a miscellaneous kind as regards their subject-matter, and forming anomalies in the general law of contract, but presenting in those anomalies some remarkable uniformities and analogies of their own which, so far as we know, have not hitherto been brought into a single view.

Between contracts which can be actively enforced by the persons entitled to the benefit of them, and agreements or promises which are not recognized as having any legal effect at all, there is another class of agreements which though they confer no right of action are yet recognized by the law for other purposes. These may be called Agreements of Imperfect Obligation. Some writers (as Pothier) speak of imperfect obligations in the sense of purely moral duties which are wholly without the scope of law : and what we here call Imperfect Obligations are in the civil law technically called Natural Obligations. But this term, the use of which in Roman law is intimately connected with the distinction between *jus civile* and *jus gentium* (a), would in English be inappropriate and possibly misleading.

How pro-
duced.

Where there is a perfect obligation, there is a right coupled with a remedy, *i.e.* an appropriate process of law by which the authority of a competent court can be set in motion to enforce the right.

Where there is an imperfect obligation, there is a right without a remedy. This is an abnormal state of things, making an

(a) Savigny, Obl. 1. 22, *sqq.*

exception whenever it occurs to the general law expressed in the maxim *Ubi jus ibi remedium*. And it can be produced only by the operation of some special rule of positive law (a). Such rules may operate in the following ways to produce an imperfect obligation :

1. By way of condition subsequent, taking away a remedy which once existed.

2. By imposing special conditions as precedent to the existence of the remedy.

3. By excluding any remedy altogether.

We shall now endeavour to show what are the effects of an imperfect obligation in these three classes of cases.

1. Under the first head we have to notice the operation of the Statutes of Limitation, so far as it illustrates the present subject (b). The statute of limitation of James I. (21 Jac. 1, c. 16, s. 3) enacts that the actions therein enumerated—which, with an exception since repealed, comprise all actions on simple contracts (c)—“shall be commenced and sued” within six years after the cause of action, and not after. By the modern statute 3 & 4 Wm. 4, c. 42, s. 3 (d), following the presumption of satisfaction after the lapse of twenty years which already obtained in practice (e), it is enacted that (*inter alia*) all actions of covenant or debt upon any bond or other specialty “shall be commenced and sued” within twenty years of the cause of action. We need not stop to consider the exceptions for disability, or the rules as to the time from which the statutes begin to run : for the object throughout this chapter will not be to define to what cases and

1. Remedy lost—
Statutes of Limitation.

(a) It was once held that a purely moral obligation might give rise to an inchoate right which could be made binding and enforceable by an express promise. And if this were so the statement in the text would not be correct : but the modern authorities disallow such a doctrine. See 2 Wms. Saund. 428 ; *supra*, p. 157.

(b) Debts contracted by an infant are often compared to debts barred by the statutes of limitation : and the comparison is just to this extent, that at common law they might be rendered enforceable in much the same manner, and practically the authorities are interchangeable on

this point. But an infant's contract is in its inception not of imperfect obligation, but simply voidable.

(c) As to the extent to which the statute applies to proceedings in equity see *Knox v. Gye*, L. R. 5 H. L. 656.

(d) This section is not affected by the Real Property Limitation Act, 1874, except that proceedings to recover rent or money charged on land will have to be taken within 12 years : 37 & 38 Vict. c. 57, ss. 1, 8.

(e) Bac. Abr. 5. 226 (Limitation D. 1) ; *Roddam v. Morley*, 1 De G. & J. 17

under what conditions the laws under consideration apply, when that is abundantly done in other treatises, but to observe the general results which follow when they do apply. .

The right
not gone.

Now there is nothing in these statutes to extinguish an obligation once created. The party who neglects to enforce his right by action cannot insist upon so enforcing it after a certain time. But the right itself is not gone. It is not correct even to say without qualification that there is no right to sue, for the protection given by the statutes is of no avail to a defendant unless he expressly claims it. Serjeant Williams, after noticing the earlier conflicts of opinion on this point, and some unsatisfactory reasons given at different times for the rule which has prevailed, concludes the true reason to be that "the Statute of Limitations admits the cause or consideration of the action still existing, and merely discharges the defendant from the remedy" (*a*). This alone shows that an imperfect obligation subsists between the parties after the time of limitation has run out. In the case of unliquidated demands that obligation is practically inoperative, since an unliquidated demand cannot be rendered certain except by action or an express agreement founded on the relinquishment of an existing remedy. But in the case of a liquidated debt the continued existence of the debt after the loss of the remedy by action may have other important effects. Although the creditor cannot enforce payment by direct process of law, he is not the less entitled to use any other means of obtaining it which he might lawfully have used before. Thus if he has a lien on goods of the debtor for a general account, he may hold the goods for a debt barred by the statute (*b*). And any lien or express security he may have for the particular debt remains valid (*c*). If the debtor pays money to him without directing appropriation of it to any particular debt, he may appropriate it to satisfy a debt of this kind (*d*): much more is he entitled to keep the

Results.
Incidental
rights of
creditor
preserved.

(*a*) 2 Wms. Saund. 168; cp. *Scarpellini v. Atcheson*, 7 Q. B. at p. 878, 14 L. J. Q. B. at p. 388, on the technical effect of a plea of the statute. It is presumed that the rule continues under the new practice.

(*b*) *Spears v. Hartly*, 3 Esp. 81.

(*c*) *Higgins v. Scott*, 2 B. & Ad. 418; *Seager v. Aston*, 26 L. J. Ch. 809 (on the statute of 3 & 4 Wm. 4).

(*d*) *Mills v. Fowkes*, 5 Bing. N. C. 455, *Nash v. Hodgson*, 6 D. M. G. 474.

money if the debtor pays it on account of the particular debt, but not knowing, whether by ignorance of fact or of law, that the creditor has lost his remedy. So an executor may retain out of a legacy a barred debt owing from the legatee to the testator (*a*). He may also retain out of the estate such a debt due from the testator to himself: and he may pay the testator's barred debts to other persons (*b*): and this even if the personal estate is insufficient (*c*). But though a creditor may retain a barred debt if he can, he may not resist another claim of the debtor against him by a set-off of the barred debt: for the right of set-off is statutory, and introduced merely to prevent cross actions, so that a claim pleaded by way of set-off is subject to be defeated in any way in which it could be defeated if made by action (*d*). This reason applies equally to all other cases of imperfect obligations. Herein our law differs from the Roman, in which *compensatio* did not depend on any positive enactment, but was an equitable right derived from the *jus gentium*.

Again, the creditor's lost remedy may be revived by the act of the debtor. The decisions on the statute of James I. have established that a renewed promise to pay, or an acknowledgment from which a promise can be inferred, excludes the operation of the statute. It was formerly held that the statute rested wholly on a presumption of payment, and therefore that any acknowledgment of the debt being unpaid, even though coupled with a refusal to pay, was sufficient. But this opinion has long since been overruled (*e*). The rule may be explained thus. It is settled law that a state of facts on which there is an existing and complete legal liability is of itself no ground for a fresh promise to satisfy the same liability: thus an express promise to pay the sum due on an account stated creates no new cause of action, there being already in contemplation of law a promise to pay on request (*f*). But in the case of a barred debt this reason for a new promise being inoperative does not exist: the original remedy is gone, while the original considera-

Acknowledgment
by debtor.

(*a*) *Courtenay v. Williams*, 3 Ha. 589, cp. *Rose v. Gould*, 15 Beav. 189.

(*b*) *Hill v. Walker*, 4 K. & J. 166, *Stahlschmidt v. Lett*, 1 Sm. & G. 415.

(*c*) *Lewis v. Rumney*, 4 Eq. 451.

(*d*) The defence of set-off must be specially met by replying the

statute of limitation, see 1 Wms. Saund. 431.

(*e*) 2 Wms. Saund. 183, 184.

(*f*) *Hopkins v. Logan*, 5 M. & W. 24; for another instance see *Deacon v. Gridley*, 15 C. B. 295, 24 L. J. C. P. 17.

tion remains as a sufficient foundation for a subsequent promise. Since the acknowledgment operates, according to the modern view, as a new promise, it is not effectual unless made before the commencement of the action (a).

What is
sufficient
acknow-
ledgment.

The modern law has been concisely stated by Mellish, L. J. "There must be one of three things to take the case out of the statute. Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or secondly, there must be an unconditional promise to pay the debt; or thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed" (b). The promise must be to pay the debt as *ex debito justitiæ*; a promise to pay as a *debt of honour* is insufficient, as it excludes the admission of legal liability (c). When the promise is implied, it must be as an inference of fact, not of law; the payment of interest under compulsion of law does not imply any promise to pay the principal (d).

The acknowledgment or promise, if express, must be in writing and signed by the debtor (9 Geo. 4, c. 14, s. 1) or his agent duly authorized (Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 13). But an acknowledgment may still be implied from the payment of interest, or of part of the principal on account of the whole, without any admission in writing (e).

Statutory
provision
for ac-
knowledg-
ment of
specialty
debts.

The more recent statute which limits the time for suing on contracts by specialty contains an express proviso as to acknowledgment and part payment (3 & 4 Wm. 4, c. 42, s. 5) (f). The cases as to acknowledgment, &c. under the statute of James, and Lord Tenterden's Act, are not applicable to this proviso. Here the operation of the acknowledgment is independent of any new promise to pay, and the action in which the acknowledgment is

(a) *Bateman v. Pinder*, 3 Q. B. 574, 11 L. J. Q. B. 281.

(b) *Mitchell's claim*, 6 Ch. at p. 828. And see *Wilby v. Elgee*, L. R. 10 C. P. 497; *Chasemore v. Turner*, (Ex. Ch.) L. R. 10 Q. B. 500, 506, 510, 520, which also shows how much difficulty there may be in determining in a particular case whether there has been an unconditional promise; *Quincey v. Sharpe*, 1 Ex.

D. 272, *Skeet v. Lindsay*, 2 Ex. D. 314.

(c) *Maccord v. Osborne*, 1 C. P. D. 569 (on Lord Tenterden's Act).

(d) *Morgan v. Rowlands*, L. R. 7 Q. B. 493, 498.

(e) 2 Wms. Saund. 181, 187, see also the notes to *Whitcomb v. Whiting*, 1 Sm. L. C. 574, sqq.

(f) See Leake on Contracts, 542; *Pears v. Laing*, 12 Eq. 41.

to be operative must be founded on the original obligation alone (a).

The Act for the Limitation of Actions and Suits relating to Real Property (3 & 4 Wm. 4, c. 27) does not only bar the remedy, but extinguishes the right at the end of the period of limitation: (s. 34, see Dart V. & P. 402). It is therefore unconnected with our present subject.

Stat. of Limitation as to Real Property: right as well as remedy taken away. English statutes of limitation, and analogous foreign laws affecting the remedy only, treated as part of *lex fori*.

We have seen that by the operation of the statutes of limitation applicable to contracts the right itself is not destroyed, but only the conditions of enforcing it are affected. The law of limitation is a law relating not to the substance of the cause of action, but to procedure. Hence follows a consequence which is important in private international law, namely that these enactments belong to the *lex fori*, not to the *lex contractus*, and are binding on all persons who seek their remedy in the courts of this country. A suitor in an English court must sue within the time limited by the English statute, though the cause of action may have arisen in a country where a longer time is allowed (b). Conversely, an action brought in an English court within the English period of limitation is maintainable although a shorter period limited by the law of the place where the contract was made has elapsed, even if a competent court of that place has given judgment in favour of the defendant on the ground of such period having expired (c).

The House of Lords, as a Scotch court of appeal, has had to decide a similar question as between the law of Scotland and the law of France. It was held that the Scottish law of prescription applied to an action brought in Scotland on a bill of exchange drawn and accepted in France, the right of action on which in France had been saved by judicial proceedings there (d). In the case where the shorter of the two periods of limitation is that allowed by the foreign law governing the substance of the

(a) *Roddum v. Morley*, 1 De G. & J. 1, opinion of Williams and Crowder, JJ. at p. 15.

(b) *British Linen Co. v. Drummond*, 10 B. & C. 903.

(c) *Huber v. Steiner*, 2 Bing. N. C. 202 (debt barred by French law): *Harris v. Quine*, L. R. 4 Q. B. 653 (debt barred by Manx law): in the

latter case Cockburn, C. J. expressed some doubt as to the principle, admitting however that the rule was settled by authority: Savigny too (Syst. 8. 273) is for applying that law which governs the substance of the contract.

(d) *Don v. Lippmann*, 5 Cl. & F. 1. See also 2 Wms. Saund. 399.

contract, and that period has elapsed, it is of course necessary to ascertain that the foreign law is analogous to our own in its operation, and merely takes away the remedy without making the contract void at the end of the time of prescription. But it is considered that an actual destruction of the right would be so inconvenient and unreasonable that it may almost be presumed that such is not the operation of the law of any civilized state; and the English courts would not put such a construction on the foreign law unless compelled so to do by very strong evidence (a).

We shall presently see that analogous questions concerning the *lex fori* may arise in other cases of imperfect obligations.

2. Conditions precedent to remedy.
A. Statute of Frauds, s. 4.

2. Under the second head fall the cases of particular classes of contracts where the law requires particular acts to be done by the parties or one of them (in respect of the form of the contract or otherwise) as conditions precedent to the contract being recognized as enforceable.

A. The most important of the enactments thus imposing special conditions on contracts is the fourth section of the Statute of Frauds (29 Car. 2, c. 3).

The fourth section enacts that after the date there mentioned "no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them: or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

The effect of the 17th section (16th in the Revised Statutes) is generally understood to be different. It does not only prevent contracts for the sale of goods of the value of 10*l.* or

(a) *Huber v. Steiner*, 2 Bing. N. C. 202, where it was in vain attempted to show that by the

French law of prescription the right was absolutely extinguished.

upwards (Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 7, has the effect of substituting "value" for "price," *Harman v. Reeve*) (a) from being sued upon except under the conditions specified, but enacts that they shall not "be allowed to be good": and, although it has never been actually so decided, it is the accepted opinion in this country that where the conditions are not satisfied the agreement is absolutely void as against the party who has not signed (b). The cases of part acceptance of the goods or part payment of the price are expressly provided for, either of these having the same effect as a duly made memorandum in writing (c).

We now return to the fourth section. For the sake of brevity we shall use the term "informal agreement" to signify any agreement which comes within this section and does not comply with its requirements. Effect of s. 4 for some time not settled.

For some time it was not fully settled what was the effect of this enactment on informal agreements. There was some authority for saying it made them void. It was never held necessary in the courts of law for a defendant sued on an informal agreement to plead the statute specially, as in the case of the statutes of limitation: and it has been held (before the C. L. P. Act) that a special plea was not only unnecessary but bad as an "argumentative denial" of the contract declared upon (d). (Since the Judicature Acts the defence of the statute must always be distinctly raised on the pleadings) (e). Moreover an action cannot be

(a) 18 C. B. 587, 595, 25 L. J. C. P. 257.

(b) Where one party has signed and the other not, the contract is said to be good or not at the election of the party who has not signed—i.e. he may sue the other who has signed, though the other cannot sue him. *Benjamin on Sale*, 188. This is also the case under s. 4: *Laythorp v. Bryant*.

(c) The distinction between the two sections is pointedly taken in *Laythorp v. Bryant*, 2 Bing. N. C. 735, 747, and *Leroux v. Brown*, 12 C. B. 801, 824, 826. A recent American writer (9 Am. Law Rev. 435) has ingeniously maintained that s. 17 is only a law of procedure. His strongest authority is *Bailey v. Sweeting*, 9 C. B. N. S. 843, 859,

30 L. J. C. P. 150, 154, where Williams, J. certainly showed an inclination to that view. The decision itself is that when once the statute is satisfied the contract is referred to the date, not of the memorandum or other act, but of the verbal agreement. Neither this, however, nor any other case cited by the writer in question, seems to go far enough to support his contention. See too *Coombs v. Bristol & Exeter Ry. Co.*, 3 H. & N. 510, 27 L. J. Ex. 401, showing that the operation of s. 17 is not confined to actions on the contract itself, but affects rights of property as against third persons.

(d) *Reade v. Lamb*, 6 Ex. 130, 20 L. J. Ex. 161.

(e) Order xix. r. 23. As to the

Decision
in *Leroux*
v. *Brown* :
agreement
not void,
but only
not en-
forceable.

maintained when, although it is not brought to enforce any right *ex contractu*, the right which is the foundation of the plaintiff's claim depends on an informal agreement. In *Carrington v. Roots* (a) the plaintiff sued in trespass for seizing his horse and cart: the defendant pleaded that they were incumbering and doing damage on his ground: the plaintiff replied a verbal agreement that the defendant should sell the crop and grass growing there to the plaintiff, and that the plaintiff might enter with his horse and cart to take them. It was held that this agreement was for the sale of an interest in land within s. 4, and that the plaintiff could not set it up, though it might have been available, as a *licence* only, in answer to an action for trespass (b). Both here and in the later case of *Reade v. Lamb* above cited the judges said distinctly enough that informal agreements were not only not enforceable but void. And so Sir W. Grant appears to have thought in *Randall v. Morgan* (c). These dicta are not consistent with the decisions to be presently mentioned in which the existence of an imperfect obligation is implied. And there had also been judicial expressions of opinion the other way. But it is not necessary to notice these, for the point was expressly decided by the Court of Common Pleas in *Leroux v. Brown* (d), where the earlier dicta are also considered. The action was on a contract not to be performed within one year, and made in France, where by the French law the plaintiff might have sued on it. For the plaintiff it was argued that s. 4 of the Statute of Frauds applied to the substance of the contract, and therefore, on general principles of private international law, did not affect contracts which were made out of England, and which as to their substance were to be governed by the law of the place where they were made. But for the defendant it was answered that this enactment, like the Statute of Limitation, only affected the remedy, and was therefore a law of the procedure of the English courts, and as such binding on all suitors who might seek to enforce their rights in those courts: the agreement might be good enough for any other purpose, but the plaintiff could not sue on it in England. And this view was adopted by the

former practice in equity see *Johnsson v. Bonhote*, (C. A.) 2 Ch. D. 298. Once properly raised (e.g. by demurrer) the defence is available without further repetition at any subsequent stage of the proceedings: *ib.*

(a) 2 M. & W. 248.

(b) Cp. *Crosby v. Wadsworth*, 6 East 602.

(c) 12 Ves. at p. 73.

(d) 12 C. B. 801, 22 L. J. C. P. 1

Court. Jervis, C. J. said: "The statute in this part of it does not say that unless those requisites are complied with *the contract shall be void*, but merely that *no action shall be brought* upon it. . . . The fourth section relates only to the procedure and not to the right and validity of the contract itself." It will be observed that the plaintiff was here in the curious position of contending, in order to support his right to recover on a contract made in France, that it would have been absolutely void if made in England (a). The decision in *Leroux v. Brown*, at least taken together with the reasoning by which it was arrived at, seems to involve the following propositions as corollaries:

(a) A foreign or colonial court would enforce an English agreement, notwithstanding that it was informal under s. 4 of the Statute of Frauds, if it had the general requisites of a valid contract in English law, and was not informal according to the local law of procedure.

(β) An English court would enforce a foreign agreement, if enforceable by the foreign law applicable to the substance of the agreement, notwithstanding that if made in England it would have been void under s. 17. (This would not be inconsistent with *Hope v. Hope* (b), which only shows that English courts will not enforce any contract, to whatever law it should be referred, which contains "any material provision tending directly to infringe within England the policy of the English law:" the expression of Turner, L. J., that a contract must be "consistent with the laws and policy of the country in which it is sought to be enforced" means, as appears by the context, nothing more extensive. The agreement there in question was made in France between an Englishman and his wife, and provided in effect for the collusive conduct of a divorce suit in England.)

It was even argued in one recent case that the words "no action shall be brought" confine the operation of the statute to civil process, so that an informal agreement for service not to be performed within a year might be enforced by criminal process under the Master and Servant Act 1867. But the Court held that such a construction would be too unreasonable, and the

(a) *Leroux v. Brown* was doubted by Willes, J. in *Williams, app. Wheeler*, resp. 8 C. B. N. S. 299,

316. Savigny, Syst. 8. 270, also takes the opposite view.

(b) 8 D. M. G. 731, 740, 743.

statute must mean that informal agreements are not to be enforced in any way (a).

Results of
imperfect
obligation
under s. 4
of Statute
of Frauds.

It being established that the informal agreements we are considering are not void, it follows that they give rise to imperfect obligations. We will now indicate the results. We have seen that neither the obligation itself, nor any right immediately founded on it, can be directly enforced. But it is recognized for the purpose of explaining anything actually done in pursuance of it, and anything so done may in many cases be a good consideration for a new obligation on a subsequent and distinct contract, or a sufficient foundation for a new obligation *quasi ex contractu*.

As to
money
paid.

A. Money paid under an informal agreement cannot be recovered back merely on the ground of the agreement not being enforceable. Thus if a responsibility has been assumed and executed under a verbal guaranty, the guarantor cannot recover back the money paid by him (b). So a purchaser cannot recover a deposit paid on an informal agreement for the sale of land, the vendor remaining ready and willing to complete (c). And not only can the one party keep money actually paid to him by the other, but if money is paid by A. to B. in order to be paid over to C. in pursuance of an informal agreement between A. and C. which C. has executed, then C. can recover it as money received to his use. In *Griffith v. Young* (d) the plaintiff was the defendant's landlord. The defendant wished to assign to one P., which he could not do without the plaintiff's consent. It was verbally agreed that P. should pay the defendant 100*l.* for goodwill, out of which the defendant was to pay 40*l.* to the plaintiff for his consent to the assignment. P. knowing of this agreement paid the 100*l.* to the defendant: it was held that the defendant was liable to the plaintiff for 40*l.* in an action for money received to his use. Lord Ellenborough said: "If one agree to receive money for the use of another

(a) *Banks v. Crossland*, L. R. 10 Q. B. 97. The Act is now repealed by the Employers and Workmen Act, 1875, 38 & 39 Vict. c. 90. *Qu.* whether the decision be applicable to the malicious breaches of contract in particular cases which are made substantive offences by the Conspiracy

and Protection of Property Act, 1875, 38 & 39 Vict. c. 86.

(b) *Shaw v. Woodcock*, 5 B. & C. 73, 83, 84, Cp. *Sweet v. Lee*, 3 M. & Gr. 452.

(c) *Thomas v. Brown*, 1 Q. B. D. 714.

(d) 12 East 513.

upon consideration executed, however frivolous or void the consideration might have been in respect of the person paying the money, if indeed it were not absolutely immoral or illegal, the person so receiving it cannot be permitted to gainsay his having received it for the use of that other."

On the same principle, if on the faith of an informal agreement money has been paid in advance to a party who afterwards refuses or fails to perform his part of it, or has been expended on his account, it is conceived that proof of the agreement may be admitted to show what was in fact the consideration which has failed (a).

B. The execution of an informal agreement may be shown as a fact, and the party who has had some benefit from such execution, so as in fact to get what he bargained for, cannot treat the bargain as a nullity. Thus the delivery of possession under an informal agreement for the sale of land is a good consideration for a promissory note for the balance of the purchase-money (b). It was held in the case cited that the bargain was for a future conveyance, and that the defendant, who did not deny the plaintiffs' allegation that they were willing to convey, had got all he bargained for.

As to
agreement
executed.

The same holds of an account stated. In *Cocking v. Ward* (c) there was an oral agreement by an incoming tenant from year to year to pay 100%. to the outgoing tenant: it was held that the agreement was within s. 4 of the statute, and the outgoing tenant could not recover the 100%. on the agreement itself, but that on an account stated he could.

Again, money due simply under an informal agreement from the plaintiff to the defendant cannot of course be set off; but the performance of an informal agreement by the defendant may be good as an accord and satisfaction. In *Lavery v. Turley* (d) the plaintiff sued for goods sold, &c.: the defendant pleaded an equitable plea showing that in pursuance of an agreement between the parties (which turned out to be verbal) the defendant had given up to the plaintiff possession of a house and premises in

(a) See *Pulbrook v. Lawes*, 1 Q. B. D. 284. 245.

(d) 6 H. & N. 239, 30 L. J. Ex. 49.

(b) *Jones v. Jones*, 6 M. & W. 84.

(c) 1 C. B. 858, 15 L. J. C. P.

satisfaction of the causes of action sued upon. The plea was held good, and it seems it was good enough at law (per Bramwell and Channell, BB). Pollock, C. B., said: "It is pleaded as a fact that the defendant performed the agreement and the plaintiff accepted such performance in satisfaction. The objection that the agreement was not in writing is got rid of: The fourth section of the Statute of Frauds does not exclude unwritten proof in the case of executed contracts" (a). This of course does not mean that the agreement itself can in any case be sued upon (a).

As to part
perform-
ance in
equity.

c. It is a well known doctrine of equity that one who has partly performed an informal agreement is entitled to and can sue for a specific performance at the hands of the other party, if the acts of part performance have been done on the faith of an existing agreement, and have been of such a kind that the parties cannot be restored to their original position. This seems to be the real meaning of the distinctions as to what is or is not a sufficient part performance (b). The statement of the law in one modern case (c), where payment of increased rent by a yearly tenant was held a sufficient part performance of an agreement for a lease, is difficult to explain on this principle, but is also difficult to reconcile with the settled rule that in the case of an agreement for sale payment of even the whole purchase-money will not do. The true ground of the decision, on which it may well stand, seems however to be this: the part performance consists not in the payment itself, but in a possession which, though continuous in time with the old possession of the plaintiff as yearly tenant, is in fact referable to the new agreement; and the payment of increased rent shows when the character of the possession was thus changed (d). This doctrine of part performance is not in direct contradiction of the Statute of Frauds. It would be erroneous to say that a court of equity accepts proof

(a) Cp. *Souch v. Stracbridge*, 2 C. B. 808, 814, 15 L. J. C. P. 170, and remarks on the dictum there in *Sanderson v. Graves*, L. R. 10 Ex. 234, 238, 241.

(b) See the authorities collected Dart V. & P. 2. 1023.

(c) *Nunn v. Fabian*, 1 Ch. 35.

(d) On the general theory of possession as constituting part per-

formance see per Jessel, M. R., *Ungley v. Ungley*, 5 Ch. D. at p. 890: "The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the Court to admit evidence of the terms of the contract in order that justice may be done between the parties."

of an oral agreement and part performance as a substitute for the evidence required by the statute. The plaintiff's right in the first instance rests not on contract but on a principle akin to estoppel; the defendant's conduct being equivalent to a continuing statement to some such effect as this: It is true that our agreement is not binding in law, but you are safe as far as I am concerned in acting as if it were. A man cannot be allowed to set up the legal invalidity of an agreement on the faith of which he has induced or allowed the other party to alter his position (a). It is but another application of the same principle of equity which is carried out in cases of representation independent of contract (see p. 583, below) and even of mere acquiescence. In equity an owner may be estopped by acquiescence from asserting his rights, although there has not been any agreement at all (b). This also explains why the plaintiff must show part performance on his own side, and part performance by the defendant would be immaterial (c). When the Court is satisfied that the plaintiff has altered his position on the faith of an agreement, and that the defendant cannot be heard to deny the existence of that agreement, it proceeds to ascertain by the ordinary means what the terms of the agreement were. The proof of this is strictly collateral to the main issue, though the practical result is that the agreement is enforced.

d. The case of an agreement in consideration of marriage presents special difficulties, and has to be treated in an exceptional manner. This subject is fully discussed in Mr. Davidson's volume on settlements (Dav. Conv. vol. 3, part 1, appendix No. 1, to which place the reader is referred for details). It is thoroughly settled that the marriage itself does not constitute such a part performance as to make the agreement binding in equity in the manner just mentioned, though other acts may have that effect (d).

(a) *Caton v. Caton*, 1 Ch. at p. 148, *Morphett v. Jones*, 1 Swanst. at p. 181, *Dule v. Hamilton*, 5 Ha. at p. 381; accordingly the cases on estoppel at law are compared by Lord Cranworth in *Jorden v. Money*, 5 H. L. C. 185, 213, and by Lord Campbell in *Piggott v. Stratton*, 1 D. F.

J. 33, 49.

(b) See *Ramsden v. Dyson*, L. R. 1 H. L. 129, 140, 168; *Powell v. Thomas*, 6 Ha. 300.

(c) *Caton v. Caton*, *supra*.

(d) See *Lassence v. Tierney*, 1 Mac. & G. 551, 571; *Surcome v. Pinniger*, 3 D. M. G. 571, 575.

Effect of
confirmation by
post-
nuptial
writing.

The next question is, what is the effect of a post-nuptial "note or memorandum" satisfying the requisites of the statute on an ante-nuptial informal agreement?

The authorities are not very clear on this point. It is submitted however that if attention be given to the actual decisions rather than to the language used on various occasions, little or no real conflict will be found. It is not the Statute of Frauds alone that has to be considered in these cases, but also the statute of 13 Eliz. c. 5, and the extensive application of it by judicial construction to voluntary dispositions of property. Two distinct questions are in fact raised: namely whether an informal ante-nuptial agreement can after the marriage be rendered valid *as against the promisor*, and whether a post-nuptial settlement can be made to relate back to such an agreement so as to be deemed a settlement made for valuable consideration and thus be rendered valid *as against creditors*. The first question is

Good as
against
promisor:
Barkworth
v. Young.

answered in the affirmative by the decision in *Barkworth v. Young (a)*. The case was decided on demurrer, and the facts assumed by the court on the case made by the plaintiff's bill were to this effect. The testator against whose estate the suit was brought had orally promised his daughter's husband before and in consideration of the marriage that at his death she should have an equal share of his property with his other children. After the marriage the testator made an affidavit in the course of a litigation unconnected with this agreement, in which he incidentally admitted it. It was held that the affidavit was a sufficient note or memorandum of the agreement within the Statute of Frauds, and that as such, although subsequent to the marriage, it rendered the agreement binding on the testator.

Bad as
against
settlor's
creditors:
Warden v.
Jones.

The second question is practically (though, as will be seen, not quite decisively) answered in the negative by the almost contemporaneous decision in *Warden v. Jones (b)*. That was a creditor's suit to set aside a post-nuptial settlement. It was attempted to support the settlement as having been made pursuant to an oral ante-nuptial agreement. This agreement was not referred to in the settlement by any recital or otherwise. It was held both by Romilly, M. R. and by Lord Cran-

(a) 4 Drew. 1.

(b) 23 Beav. 487, 2 De G. & J. 76.

worth, C. on appeal, that the settlement could not be supported : and Lord Cranworth inclined to think (a) that if the settlement had expressly referred to the agreement it would have made no difference.

The result of this and of *Barkworth v. Young* appears to be that the imperfect obligation arising from an informal ante-nuptial agreement can be made perfect and binding as between the parties by a post-nuptial note or memorandum ; but that the marriage consideration cannot in this way be imported into a post-nuptial settlement made in pursuance of the agreement so as to protect it from being treated as a voluntary settlement and subject to the consequent danger of being set aside at the suit of the settlor's creditors. There seems to be no ground in either case for drawing any distinction between promises made by one of the persons to be married and promises made by a third person to either of them. These doctrines appear to be both reasonable in themselves and not inconsistent with one another. There is nothing unexampled in a transaction being valid as regards the parties to it and invalid as regards the rights of other persons. It is difficult to see why a writing satisfying the requisites of the statute should in this case be deprived of its effect as against the party to be charged merely by reason of the marriage having taken place between the dates of the original promise and of the writing. On the other hand it is plain that the rights of creditors would be in serious danger if a mere reference to an ante-nuptial agreement, of which there was no evidence beyond the memory of the persons who for this purpose would have a common interest in upholding its existence, were to be admitted to make a post-nuptial settlement unimpeachable (b).

There is yet another class of cases, not resting on contract or agreement at all (c), in which courts of equity have compelled persons to make good the representations on the faith of which

Cases of equitable estoppel distinguished.

(a) Notwithstanding *Dundas v. Dutens*, 1 Ves. jun. 199.

(b) Cp. the remarks of Sir T. Plumer, M. R. in *Battersbee v. Farrington*, 1 Swanst. 106, 113, doubting whether a recital in a post-nuptial settlement of ante-nuptial written articles would of itself as against creditors be suffi-

cient evidence of the existence of such articles. And see May on Voluntary and Fraudulent Alienations of Property, Chap. 5, p. 346, sqq.

(c) Per Lord Selborne, *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, L. R. 6 H. L. 352, 360.

understanding of those engaged in marine insurance the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can without the assent of the other deviate from the terms thus agreed on without a breach of faith. Accordingly, though the contract expressed in the slip is not valid, that is, not enforceable at law or in equity, it may be given in evidence wherever it is, though not valid, material (a). In the case referred to the slip was admitted to show whether the intention of the parties was to insure goods by a particular named ship only, or by that in which they might be actually shipped, whatever her name might be. A still more important application of the same principle was made in *Cory v. Patton* (b), where it was held that the time when the contract is concluded and the risk accepted is the date of the slip, at which time the underwriter becomes bound in honour, though not in law, to execute a formal policy; that the Court, when a duly stamped policy is once before it, may look to the slip to ascertain the real date of the contract; and therefore that if a material fact comes to the knowledge of the assured after the date of the slip and before the execution of the policy, it is not his duty either in honour or in law to disclose it, and the non-disclosure of it does not vitiate the policy. This holds though after the completion of the contract by the slip a new term be added for the benefit of the underwriters (c). The same doctrine has been considered and allowed, though not directly applied, in other cases. In *Fisher v. Liverpool Marine Insurance Co.* (d) the slip had been initialed but the insurance company had executed no policy. In the case of an insurance with private underwriters it is the duty of the broker of the assured to prepare a properly stamped policy and present it for execution. But in the case of a company the policy is prepared by the company, executed in the company's office, and handed over to the assured or his agent on application. It was held that there was no undertaking by the company, distinguishable from the contract of insurance itself, to do that which it would be the duty of a broker to do in

To explain
intention
of parties.

To fix true
date of
contract.

Collateral
bearings
of the
doctrine.

(a) Per Cur. *Ionides v. Pacific Insurance Co.* L. R. 6 Q. B. 674, 685, affd. in Ex. Ch. 7 Q. B. 517.

(b) L. R. 7 Q. B. 304, see further s. c. 9 Q. B. 577.

(c) *Lishman v. Northern Maritime Insurance Co.* L. R. 8 C. P. 216, affirmed in Ex. Ch. 10 C. P. 179.

(d) L. R. 8 Q. B. 469 (Blackburn J. diss.) affd. in Ex. Ch. 9 Q. B. 218.

the case of private underwriters; that the only agreement of the company with the assured was one entire agreement made by the initialing of the slip, and that as this was an agreement for sea insurance, the statute applied and made it impossible to maintain any action for a breach of duty with regard to the preparation and execution of a policy. In *Morrison v. Universal Marine Insurance Co.* (a), the question arose of the effect of delivering without protest a stamped policy pursuant to the slip after the insurers had discovered that at the date of the slip a material fact had been concealed. It was held in the Exchequer Chamber, reversing the judgment of the Court below, that the delivery of the policy did not preclude the insurers from relying on the concealment, but that it was a question properly left to the jury whether they had or had not elected to abide by the contract. This implies not only that the rights of the parties are determined at the date of the slip, but that the execution of the stamped policy afterwards has little or no other significance than that of a necessary formality (b). In the case of a mutual marine insurance association, a letter by which the assured undertook to become members of the association was admitted as part of one agreement with the stamped policy, to show that the assured were contributories in the winding up of the association (c). In the winding up of another such association a member has been admitted as a creditor for the amount due on his policy, though unstamped, when the liability was admitted by entries in the minute books of the association, which seem to have been considered equivalent to an account stated (d).

Application in winding up insurance companies.

It has already been observed that the general revenue laws as to stamp duties are on a different footing. However their effects may in one or two cases resemble to some extent those which under the present head we have attempted to exhibit. Thus if an unstamped document combines two characters (as, for instance, if it purports to show both an account stated and a receipt) and if in one of those characters it requires a stamp, and in the other not, it may be given in evidence in the second character for any purpose unconnected with the first (e).

(a) L. R. 8 Ex. 40, in Ex. Ch. *ib.* 197.

(b) See the judgement of Cleasby, B. in the Court below, L. R. 8 Ex. at p. 60.

(c) *Blyth & Co.'s ca.* 13 Eq. 529.

(d) *Martin's claim*, 14 Eq. 148.

(e) *Matheson v. Ross*, 2 H. L. C. 286, and see Chitty on Contracts, 125 (10th ed.).

Stamp duties in general.

Variation
by sub-
sequent
un-
stamped
agreement.

In a case where the parties to an agreement in writing had afterwards varied its terms by a memorandum in writing, and the memorandum was not stamped, the plaintiff joined in his action a count on the agreement in its original form and another on the agreement as varied: and when it appeared by his own evidence that the memorandum did materially alter the first agreement, but was unavailable for want of a stamp, it was held that he could not fall back on the agreement as it originally stood (*a*). Neither this decision, nor the earlier authorities on which it rested, were referred to in *Noble v. Ward* (*b*). In that case there was a substituted agreement which was void under s. 17 of the Statute of Frauds: and it was held that as the parties had no intention of simply rescinding the former agreement, that former agreement remained in force. The two cases, if they can stand together, must do so by reason of the distinction between a contract the record of which is unavailable for want of a stamp, and an agreement which is void from its inception.

Attempts
to use
un-
stamped
documents
in a
different
character.

In a recent case in equity it was unsuccessfully attempted to make use of an unstamped letter, which in effect was a bill of exchange, and as such unavailable, as amounting to an equitable assignment (*c*).

In a much litigated case of *Evans v. Prothero* (*d*) the question arose whether a document purporting to be a receipt for purchase-money on a sale of land, but insufficiently stamped for that purpose, can be admitted as evidence to prove the existence of an agreement for sale: but the form in which it arose was unfortunately ill suited for the attainment of a final and satisfactory decision. The existence of the agreement was in issue on a trial directed by the Court of Chancery: the document above mentioned was tendered as proof and objected to: the jury found in favour of the agreement, and a new trial was applied for. This was granted by Lord Cottenham: on the second trial the same thing happened again: Lord Cottenham sent the case back to a third trial, holding on each occasion that the document was in-

(*a*) *Reed v. Deere*, 7 B. & C. 261.

(*b*) L. R. 1 Ex. 117, in Ex. Ch. 2 Ex. 135: but otherwise where the substituted agreement has been executed in part; for this shows

that the old one is gone: *Sanderson v. Graves*, L. R. 10 Ex. 234.

(*c*) *Ex parte Shellard*, 17 Eq. 109.

(*d*) 2 Mac. & G. 319, 1 D. M. G. 572.

admissible. The third trial took the same course as the first and second. But the motion for a fourth trial came before Lord St. Leonards, who took a contrary view to Lord Cottenham's and refused it. The judges before whom the applications came in the Court of Chancery in the first instance, and those before whom the issues were tried at Cardiff assizes, were also divided in opinion. The point must therefore be regarded as still quite unsettled, though the analogy of other authorities seems to favour the opinion of Lord St. Leonards.

C. There are also many statutes which impose special conditions on the exercise of particular professions and occupations and the sale of particular kinds of goods. Most of these, however, are so framed, or have been so construed, as to have an absolutely prohibitory effect, that is, not merely to take away or suspend the remedy by action, but to render any transaction in which their provisions are disregarded illegal and void. The principles applicable to such cases have been considered under the head of Unlawful Agreements (Ch. VI.). In a few cases, however, there is not anything to prevent a right from being acquired, or to extinguish it when acquired, but only a condition on which the remedy depends. Of this kind are the provisions of the Act 6 & 7 Vict. c. 73, with respect to attorneys and solicitors, and of the Medical Act, 1858 (21 & 22 Vict. c. 90), with respect to medical practitioners.

C. Statutory conditions affecting professions, &c.

By the 6 & 7 Vict. c. 73, s. 26, it is enacted in substance that an attorney or solicitor practising in any court without having a stamped certificate then in force (as provided for by ss. 22-25, and now 23 & 24 Vict. c. 127, ss. 18-23) shall not be capable of recovering his fees for any business so done by him while uncertificated. This however does not make it unlawful for the client to pay such fees if he thinks fit, nor for the solicitor to take and keep them. And the Court of Common Pleas has held that a defeated party in an action who has to pay his adversary's costs is bound by any such payment which has been actually made, and cannot claim to have it disallowed after taxation, though it seems the objection might have been successful if made in time before the taxing master (a). In equity the principle has been carried out farther: the objection was made

Attorneys and solicitors. Costs of uncertificated solicitor how far allowed.

(a) *Fullalove v. Parker*, 12 C. B. N. S. 246, 31 L. J. C. P. 239, 240.

on taxation, and overruled by the taxing master : and it was decided by the Court of Appeal that the costs must be paid. Here it was said that the client was bound in honour to pay his solicitor, though he could not have been compelled to do so, and it might be presumed in the absence of proof to the contrary that he had in fact paid these costs ; and then he had a right to recover them over from the other side (*a*). And in another somewhat earlier case (*b*) it was decided that items for business done by a solicitor while uncertificated must be allowed as against the client in a taxation on the client's own application, for the client submits to pay what shall be found due, not only what the solicitor might have sued for, and the debt is not destroyed. Proceedings taken by a solicitor who has not renewed his certificate cannot be on that account set aside as irregular (*c*). It is said that an attorney can have no lien for business done by him while uncertificated (*d*). But the case cited for this (*e*) was on the earlier Attorneys Act, 37 Geo. 3, c. 90, by which the admission of an attorney neglecting to obtain his certificate as thereby directed was in express terms made void (s. 31) : it was held that under the special circumstances of the case (which it is unnecessary to mention), there had been a neglect within the meaning of the statute so that the attorney's admission was void, and that he must be regarded as having been off the roll of attorneys. He was therefore, as a necessary consequence, incapable of acquiring any right whatever as an attorney while thus disqualified. It is submitted that under the modern Act there is no reason for depriving an uncertificated solicitor of his lien, at any rate in the absence of any wrong motive or personal default in the omission to take out the certificate.

As to time
of suing
for costs.

Apart from this, a solicitor cannot in any case sue for costs till a month after the bill has been delivered (6 & 7 Vict. c. 73, s. 37), unless authorized by a judge to sue sooner on one of certain grounds now much enlarged by the Legal Practitioners Act, 1875, 38 & 39 Vict. c. 79.

(The special agreements between solicitor and client made lawful by the Act of 1870 belong to a different category,

(*a*) *Re Hope*, 7 Ch. 766.

ed. 1866.

(*b*) *Re Jones*, 9 Eq. 63.

(*e*) *Wilton v. Chambers*, 7 A. & E.

(*c*) *Sparling v. Brereton*, 2 Eq. 64.

524.

(*d*) *Chitty's Archbold's Pr.* 69,

as they cannot be sued on as contracts at all. See below, p. 596).

The rights of medical practitioners now depend on the Medical Act, 1858, and (in England only) the Apothecaries Act, 55 Geo. 3, c. 194. Before the Medical Act the state of the law, so far as concerned physicians (but not surgeons or apothecaries) was this. It was presumed, in accordance with the general usage and understanding, that the services of a physician were honorary, and were not intended to create any legal obligation: hence no contract to pay for them could be implied from his rendering them at the request either of the patient or of a third person. But this was a presumption only, and there was nothing contrary to law in an express contract to pay a physician for his services, which contract would effectually exclude the presumption (a).

The Medical Act, 1858 (21 & 22 Vict. c. 90), s. 31, enacts that every person registered under the Act shall be entitled according to his qualification to practise medicine, &c., and to recover reasonable charges for professional aid, &c.: but it is provided that any college of physicians may pass a by-law that none of their fellows or members shall be entitled to sue "in manner aforesaid." The effect of this enactment is to put an end to the presumption of honorary employment which formerly existed (b). It remains competent however for a medical man to attend a patient on the understanding that his attendance shall be gratuitous, and whether such an understanding exists or not in a disputed case is a question of fact for a jury (c).

By the Act 55 Geo. 3, c. 194, s. 21, an apothecary cannot recover his charges without having a certificate from the Apothecaries' Society: and this is not repealed by the Medical Act (d). Moreover s. 31 of the Medical Act enables a practitioner to sue only "according to his qualification," and a qualification in one capacity does not entitle him to sue for services rendered in another (e).

(a) *Veitch v. Russell*, 3 Q. B. 928, 12 L. J. Q. B. 13.

(b) *Gibbon v. Budd*, 2 H. & C. 92, 32 L. J. Ex. 182. See judgment of Martin, B.

(c) *Gibbon v. Budd*, last note.

(d) See decisions on this Act collected, 1 Wms. Saund. 513-4.

(e) *Leman v. Fletcher*, L. R. 8 Q. B. 319.

Does s. 31 of the Medical Act extend to express contracts

It may perhaps be doubted whether the "reasonable charges" of s. 31 include remuneration for which there is an express contract: for as to this there was no necessity for any enabling enactment. Again this question arises—can a patient who has expressly contracted to pay his physician avail himself of this section to refuse payment on the ground of the charges being unreasonable? Then, if the proviso as to collegiate by-laws is to be taken as applicable only to the same matter as the enactment which it qualifies, it may possibly follow that there is no power for a college to make a by-law to restrain a fellow or member from suing on an express contract. It seems more probable, however, that s. 31 should be read together with the following section (s. 32) and taken as co-extensive with it. That section enacts that no practitioner shall recover *any charge* for medical or surgical advice, &c. unless he proves that he is registered under the Act (*a*). And this at all events includes express as well as implied contracts; it also includes contracts made with any third person who is to pay for medical attendance as well as those made with the patient himself. In *Alvarez de la Rosa v. Prieto* (*b*) the plaintiff was a Spanish practitioner domiciled in England but unregistered, and he had agreed with the defendant, who was the chief medical officer of a Peruvian ship of war lying in the Thames, to take the medical charge of the men on board for a fixed monthly sum during the defendant's absence. It was held that this contract fell within the Act and the plaintiff could not recover. It made no difference that the defendant was a medical man, for the plaintiff was not his assistant but was acting independently, and merely looked to him for payment. It was also argued that the contract should be governed not by the law of England but by the law of Peru: but the court held that since s. 32 of the Medical Act was part of the *lex fori* of the country where the remedy was sought, the

(*a*) It was held not necessary that the practitioner should have been registered at the time of rendering the services sued for if he could prove that he was actually registered at the time of the trial in *Turner v. Reynall*, 14 C. B. N. S. 328, 32 L. J. C. P. 164. But see *contra*, *Leman v. Houseley*, L. R. 10 Q. B. 66, decisively and at all events as to

apothecaries; for an unrepealed section of the Apothecaries Act (55 Geo. 3, c. 194, s. 20) expressly forbids unqualified persons to practise: and in the clear opinion of the Court on the construction and intention of the Medical Act also.

(*b*) 16 C. B. N. S. 578, 33 L. J. C. P. 262.

general rule that the *lex fori* governs the remedy must be applied. Cp. the decision on s. 4 of the Statute of Frauds in *Leroux v. Brown* (a).

By the Austrian Code (§ 879) special agreements for remuneration between a physician or surgeon and his patient, as well as between a lawyer and his client, are null and void.

The general result is that according to the modern law there is no presumption against the existence of a contract to remunerate a medical attendant for his services, but registration under the Medical Act, and also the proper special qualifications for the special branch of practice in which the services are rendered, (which registration and qualification, according to the later and better opinion, must exist at the time the services are rendered) (b), are conditions precedent to his recovering anything for such services on a contract either express or implied: and the right to recover on an implied contract at all events (and probably also on an express one) may be excluded in the case of fellows or members of any college of physicians by a prohibitive by-law (c). Moreover it seems probable that even an express contract is subject to the condition of the charges being reasonable.

General result as to medical men's charges.

3. We now come to the cases in which some positive rule of law or statutory enactment takes away the remedy altogether.

3. No remedy allowed.

The only cases known to the writer in which there is a rule of law to this effect independent of any statute are those of the remuneration of barristers engaged as advocates in litigation, and (to a limited extent) of arbitrators.

With regard to arbitrators the better opinion appears to be that they are in the same condition as physicians were at common law. It is said that an arbitrator cannot recover on any implied contract for his remuneration, but there is no doubt that he can sue on an express contract (d).

Arbitrators.

The position of a barrister is different.

Barristers.

The opinion was indeed not untenable, until quite recently,

(a) 12 C. B. 801, 22 L. J. C. P. 1; *supra*, p. 576.

(b) *Leman v. Houseley*, L. R. 10 Q. B. 66.

(c) Such a by-law has been passed (as to fellows only) by the

Royal College of Physicians in London.

(d) *Hoggins v. Gordon*, 3 Q. B. 466, 11 L. J. Q. B. 286; *Veitch v. Russell*, *ib.* 928, 12 L. J. Q. B. 13.

that in the case of counsel, as in that of a physician, there was a presumption of purely honorary employment, derived from the custom of the profession, but that this presumption would be excluded by proof of an express contract. So Lord Denman seems to have been inclined to think in *Veitch v. Russell* (a): and a modern case of *Hobart v. Butler* in the Irish Exchequer, though it did not decide the point, proceeded to some extent on the same assumption (b).

No remedy
against
client in
respect of
litigious
business.

But the decision of the Court of Common Pleas in *Kennerly v. Brown* (c) has established the unqualified doctrine that "the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation." The request and promises of the client, even if there be express promises, and the services of the counsel, "create neither an obligation nor an inception of obligation, nor any inchoate right whatever capable of being completed and made into a contract by any subsequent promise."

Distinc-
tion when
barrister
acts as
arbitrator,
&c.

On the other hand there is apparently no reason to doubt the validity of an express contract to remunerate a barrister for services which, though to some extent of a professional kind, and involving the exercise of professional knowledge, do not involve any relation of counsel and client between the contracting parties: as when a barrister acts as arbitrator or returning officer (d). The want of attending to this distinction has led to such cases being cited as authorities for the general proposition that a barrister can recover fees on an express contract.

Express
contract
with client
as to non-
litigious
business:
qu.

Moreover, it has been argued that an express contract even between counsel and client may still be good as to non-litigious business. A claim of this sort made against an estate under administration was disposed of by Giffard, L. J. on the ground, which was sufficient for the particular decision, that at all events a solicitor has no general authority to bind his client by such a contract: but he also observed that such applications had never been successful, and expressed a hope that they never would

(a) See last note.

(b) 9 Ir. C. L. 157.

(c) 13 C. B. N. S. 677, 32 L. J. C. P. 137.

(d) *Hoggins v. Gordon*, 3 Q. B. 466, 11 L. J. Q. B. 286; *Egan v. Guardians of Kensington Union*, 3 Q. B. 935, n.

be (a). And it must be remembered that although the rule laid down in *Kennedy v. Broun* is in its terms confined to litigation, and the word *advocate*, not *counsel*, is studiously used throughout the judgment, yet the rule is founded not on any technical distinction between one sort of business and another, nor on any mere presumption, but on a principle of general convenience supported by unbroken custom. No doubt it may be said that some of the reasons given for the policy of the law do not apply in their full extent to non-litigious business (b). But on the whole there is reason to suppose that English courts of justice are more likely to extend than to narrow the scope of the leading decision, called by the late L. J. Giffard "a landmark of the law on this subject" (c), if at any future time the occasion presents itself.

There is no express authority to show whether a barrister can or cannot contract with his client's solicitor for payment of his fees any more effectually than with the client himself. It is apprehended that, inasmuch as counsel's services are given not to the solicitor but to the client, there would be no consideration to support such a contract unless the solicitor had actually received the fees from the client. In that case it cannot be affirmed with any confidence that the barrister has no legal rights against the solicitor. A barrister has in fact been admitted to prove in bankruptcy against the estate of a firm of solicitors for fees (apparently for conveyancing, not litigious business) which had been actually paid by clients to the bankrupts before the bankruptcy (d). If this be right, it is difficult to see why an

Rights of
barrister
as against
solicitor:
qu.

(a) *Mostyn v. Mostyn*, 5 Ch. 457, 459. It may be well to warn the reader that the cases there referred to in argument in favour of the counsel's claim are, with the sole exception of *Hobart v. Butler*, 9 Ir. C. L. 157, irrelevant. For instance *Doe d. Bennett v. Hale*, 15 Q. B. 171, 18 L. J. Q. B. 353, shows only that there is no absolute rule of law that in a civil cause a barrister may not be instructed directly by the client, and throws no light whatever on any question of a right to recover fees. *Hobart v. Butler* was relevant enough, but the wrong way: for it was really a decision

against a similar claim and on an almost identical point.

(b) In addition to *Kennedy v. Broun*, see *Morris v. Hunt*, 1 Chitty 544, 550, 554, where the rule is put on the ground that the remuneration of the counsel ought to be independent of the result of the cause, and therefore counsel should rely on prepayment alone. This reason would however be equally inapplicable to an express and unconditional contract to pay fees for advocacy, if made before the commencement of the litigation.

(c) *Mostyn v. Mostyn*, *supra*.

(d) *Re Hall*, 2 Jur. N. S. 1076.

express promise by the solicitor to pay such fees, or an account stated between the solicitor and the counsel in respect of them, should not be binding. On the other hand the Court of Common Pleas has refused to exercise a summary jurisdiction, on the motion of the client, to compel an attorney to pay to counsel fees alleged to have been paid by the client, or else to return them to the client (*a*). The case, however, was a peculiar one and goes but a very little way towards answering the general question. In the argument of *Hobart v. Butler* (*b*) two unreported (presumably Irish) cases were cited to show that a barrister has a remedy in some form, it does not appear what, to recover fees which have been received by the solicitor. The Court expressed no opinion as to their authority.

Recogni-
tion of
counsel's
fees in
taxation
of costs.

It is hardly necessary to add that although counsel's fees cannot be recovered in any way by action, except possibly in some of the cases which have been mentioned as still doubtful, the propriety of paying such fees is judicially recognized by the constant practice of the courts in the taxation of costs: and the solicitor needs no authority from the client beyond his general retainer to enable him to retain and pay counsel and charge the fees to his client (*c*). The payment of counsel's fees may in this manner be indirectly enforced either against the client himself or against an unsuccessful adversary who is liable for the taxed costs.

Notwithstanding the strong expressions used by the Court in *Kennedy v. Broun* (*d*), the judicial notice thus taken of the obligation of a client to pay his counsel seems to be alone quite sufficient to warrant us in treating it here as being, though imperfect in the nature of a legal duty, and on a different footing from a mere moral obligation.

Special
agree-
ments
between
solicitor
and client
under the
statute.

By the Attorneys and Solicitors Act, 1870, (33 & 34 Vict. c. 28) special agreements for remuneration between solicitor and client are made lawful (s. 4) and in a qualified manner enforceable. They cannot be sued upon as ordinary contracts, but the procedure is by motion or petition, when the Court may enforce the agreement if it appears to be in all respects fair and reasonable, or otherwise set it aside. In the last case the Court may direct

(*a*) *Re Angell*, 29 L. J. C. P. 227. 544.

(*b*) 9 Ir. C. L. 157.

(*c*) See *Morris v. Hunt*, 1 Chitty

(*d*) 13 C. B. N. S. 677, 32 L. J.

C. P. 137.

the costs of the business included in the agreement to be taxed in the regular way (ss. 8, 9). Where there is an agreement to employ a solicitor on certain terms at a future time, this does not prevent the solicitor from suing the client in a court of law if the client refuses to let him transact the business at all. The Act applies only to that part of an agreement which fixes the mode of payment for work done (a).

Since the Infants Relief Act, 1874, any contract of an infant voidable at common law and affirmed by him on attaining his majority must be reckoned as an imperfect obligation of this class, viz. on which there has not been and cannot be any remedy. The special features of this subject have been already considered (b), and there is nothing to add except that the general principles set forth in the present chapter seem to be applicable to these as well as to other agreements of imperfect obligation.

There are sundry other cases of a less important kind in which the remedy naturally attached to a contract is taken away by statute, without the contract itself being forbidden or avoided.

By the Act 24 Geo. 2, c. 40, s. 12, commonly known as the Tippling Act, no debt can be recovered for spirituous liquors supplied in quantities of less than twenty shillings' worth at one time (c). The County Courts Act, 1867 (30 & 31 Vict. c. 142, s. 4), similarly enacts that no action shall be brought in any court for the price of beer or other specified liquors *ejusdem generis* consumed on the premises. The Act of Geo. 2 applies whether the person to whom the liquor is supplied be the consumer or not (d). As these enactments do not make the sale illegal, money which has been paid for spirits supplied in small quantities cannot be recovered back (e). A debt for such

Voidable contracts of infants affirmed at full age.

Other cases where contract not illegal, but remedy taken away by statute.

Small debts for spirits by Tippling Act, 24 Geo. 2; for beer, &c., by County Courts Act, 1867.

(a) *Rees v. Williams*, L. R. 10 Ex. 200. By the terms of the Act the agreement must be in writing, and it seems it must be signed by both parties: *Ex parte Munro*, 1 Q. B. D. 724.

(b) *Supra*, Chap. II., p. 43.

(c) By 25 & 26 Vict. c. 38 an exception is made in favour of sales

of spirituous liquor not to be consumed on the premises, and delivered at the purchaser's residence in quantities of not less than a reputed quart.

(d) *Hughes v. Done or Doane*, 1 Q. B. 294, 10 L. J. Q. B. 65.

(e) *Philpott v. Jones*, 2 A. & E. 41.

supplies was once held to be an illegal consideration for a bill of exchange (*a*): but this decision seems dictated by an excess of zeal to carry out the policy of the Act, and is possibly questionable. In a later case at Nisi Prius (*b*) Lord Tenterden held that where an account consisted partly of items for spirituous liquors within the Tippling Act, and partly of other items, and payments had been made generally in reduction of the account, the vendor was at liberty to appropriate these payments to the items for liquor, so as to leave a good cause of action for the balance; thus treating these debts, like debts barred by the Statute of Limitation of James I., as existing though not recoverable.

The writer is not aware of any decision on the modern enactment as to beer, &c., in the County Courts Act, 1867.

Trade
union
agree-
ments
under
Trade
Union
Act, 1871.

By the Trade Union Act, 1871 (34 & 35 Vict. c. 31) s. 4, certain agreements therein enumerated and relating to the management and operations of trade unions cannot be sued upon, but it is expressly provided that they are not on that account to be deemed unlawful. In this enumeration are included agreements to pay subscriptions. Practically trade union subscriptions are thus placed on the same footing as subscriptions to any club which is not proprietary (*c*). So far as we are aware there is nothing in principle against the payment of subscriptions to a club being legally enforced: but it would in most cases be extremely difficult, if not impossible, to ascertain who were the proper persons to sue (*d*). The same difficulty exists in the case of any numerous unincorporated association. But this belongs to another division of our subject (*e*).

Cases of
analogy to
imperfect

The present place seems on the whole the most appropriate one for mentioning a singular case which may be regarded as the con-

(*a*) *Scott v. Gillmore*, 3 Taunt. 226.

(*b*) *Crookshanks v. Rose*, 5. C. & P. 19.

(*c*) In the case of a proprietary club the proprietor can sue: see *Raggett v. Bishop*, 2 C. & P. 343, *Raggett v. Musgrave*, *ib.* 556.

(*d*) In the common law courts of some of the United States, however, the still more difficult attempt has been made to enforce promises to subscribe to public objects in which the subscribers had a common

interest; and in Massachusetts and New York not without success: *Hilliard on Contracts*, l. 259; *Parsons on Contracts*, l. 377. But see now *Cottage Street Church v. Kendall*, 121 Mass. 528, where the opinion expressed in earlier dicta, that "it is a sufficient consideration that others were led to subscribe by the very subscription of the defendant," was overruled.

(*e*) See pp. 199, 216, *supra*.

verse of those we have been dealing with. A valuable consideration is given in the course of a transaction which as the law stands at the time is wholly illegal and confers no right of action on either party. Afterwards the law which made the transaction illegal is repealed. Is the consideration so received a good foundation for a new express promise on the part of the receiver? The question came before the Court of Exchequer in 1863, some years after the repeal of the usury laws. The plaintiff sued on bills of exchange drawn and accepted after that repeal, but in renewal of other bills given before the repeal in respect of advances made on terms which under the old law were usurious. The former bills were unquestionably void : but it was held by the Court (Martin, B. dissenting) that the original advance was a good consideration for the new bills. The question was thus stated in the judgment of the majority :—"Whether an advance of money under such circumstances as to create no legal obligation at the time to repay it can constitute a good consideration for an express promise to do so." And the answer was given thus :—"The consideration which would have been sufficient to support the promise if the law had not forbidden the promise to be made originally does not cease to be sufficient when the legal restriction is abrogated. . . A man by express promise may render himself liable to pay back money which he has received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt" (a).

obligations.
Effect of
repeal of
usury laws
as to
advances
made
before.

The debt, therefore, which was originally void by the usury laws, seems to have been put in the same position by their repeal as if it had been a debt once enforceable but barred by the Statute of Limitation.

There is one other analogy to which it is worth while to advert, although it was never of much practical importance, and what little it had has in England been taken away by the Judicature Acts. Purely equitable liabilities have to a certain extent been treated by common law courts as imperfect obligations. The mere existence of a liquidated claim on a trust against the trustee confers no legal remedy. But the trustee may make himself legally liable in respect of such a claim by an

Treatment
of equitable
obligations at
common
law.

(a) *Flight v. Reed*, 1 H. & C. 703, 715, 716 ; 32 L. J. Ex. 265, 269.

account stated (*a*), or by a simple admission that he holds as trustee a certain sum due to the cestui que trust (*b*). A court of law has also held that a payment made by a debtor without appropriation may be appropriated by the creditor to an equitable debt (*c*).

Summary
of results.

It may be useful to sum up in a more general form the results which have been obtained in this chapter.

An imperfect obligation is an existing obligation which is not directly enforceable.

This state of things results from exceptional rules of positive law, and especially from laws limiting the right to enforce contracts by special conditions precedent or subsequent.

When an agreement of imperfect obligation is executory, a right of possession immediately founded on the obligation can be no more enforced than the obligation itself.

Acts done in fulfilment of an imperfect obligation are valid, and may be the foundation of new rights and liabilities, by way of consideration for a new contract or otherwise.

A party who has a liquidated and unconditional claim under an imperfect obligation may obtain satisfaction of such claim by any means other than direct process of law which he might have lawfully employed to obtain it if the obligation had not been imperfect.

The laws which give rise to imperfect obligations by imposing special conditions on the enforcement of rights are generally treated as part of the law of procedure of the forum where they prevail (*d*), and as part of the *lex fori* they are applicable to contracts sued upon in that forum without regard to the law governing the substance of the contract (*e*), but on the other hand they are not regarded in any other forum.

(*a*) *Topham v. Morecroft*, 8 E. & B. 972, 983; *Howard v. Brownhill*, 23 L. J. Q. B. 23.

(*b*) *Roper v. Holland*, 3 A. & E. 99.

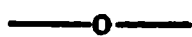
(*c*) *Bosanquet v. Wray*, 6 Taunt. 597.

(*d*) *Contra Savigny*, Syst. 8. 270,

273.

(*e*) This (it is conceived) does not apply to revenue laws, and enactments which are merely ancillary to revenue laws, such as the 30 Vict. c. 23, s. 7, as to marine insurances.

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I cannot too strongly express my obligations to Mr. Biddle, of the Master of the Rolls' Chambers, for his assistance in the preparation of this edition. The whole book has been revised by him; and I have throughout received from him very valuable suggestions. He has also relieved me of much labour by revising and annotating the forms annexed to the rules, and in many other ways.

I wish particularly to notice the Table of Cases, which Mr. Biddle has prepared. The course ordinarily adopted throughout the book is to cite each case with a reference to only one report of it, except where there appeared special reason for referring to another. The Law Reports are commonly cited where the case has appeared in that series. To have mentioned in the body of the work every report of each case would have been a cumbrous and I think an inconvenient plan. On the other hand, many practitioners use series of reports other than those commonly cited in this Book. To meet the difficulty thus arising, the Table of Cases gives a reference to all the reports of each case cited.

The reconstruction of the Index, rendered necessary by the large amount of new matter, has been kindly undertaken by my learned friend, Mr. Harry Greenwood, of the Chancery Bar.

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